163 U.S. 353

THE LAW ASSOCIATION
OF
PHILADELPHIA.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

No. ~~485~~. 560 258

THE TEXAS AND PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

MAY GENTRY, OLIVE LEE GENTRY, THOMAS M. GENTRY, AND MARY A. GENTRY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

FILED AUGUST 2, 1893.

(15,369.)

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SUPREME COURT OF THE UNITED STATES.

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MAY GENTRY, OLIVE LEE GENTRY, THOMAS M. GENTRY, AND MARY A. GENTRY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA,
Fifth Judicial Circuit.

Pleas and proceedings had and done at a regular term of the United States circuit court of appeals for the fifth circuit, begun and held pursuant to law in the court-room of said court, in the city of New Orleans, State of Louisiana, on the third Monday of November, A. D. 1892.

Present and presiding: The Honorable Don A. Pardee, United States circuit judge for the fifth judicial circuit.

Present also: The Honorable A. P. McCormick, United States circuit judge for the fifth judicial circuit, and the Honorable James W. Locke, United States district judge for the southern district of Florida.

THE TEXAS & PACIFIC RAILWAY COMPANY
v.
MAY GENTRY *et als.*

Be it remembered that on the 27th day of March, 1893, a transcript of the record of the above-styled cause in the United States circuit court for the northern district of Texas was filed in the United States circuit court of appeals for the fifth circuit as follows, to wit:

1 *Caption.*

Be it remembered, that a term of the Circuit Court of the United States Circuit in the Fifth Circuit thereof and in and for the Northern District of Texas, at Dallas, begun and holden at Dallas, Texas, on the ninth day of January, 1893, and which term adjourned on the tenth day of March, 1893, the Honorable John B. Rector, United States District Judge for the Northern District of Texas, presiding, the following proceedings were had and the following cause came on for trial and was tried, to wit:

Style of Cause.

MAY GENTRY ET AL.,
vs.
THE TEXAS AND PACIFIC RAILWAY COMPANY. } No. 1377.

Plaintiff's 2nd Amended Original Petition.

Filed Feb. 11, 1892.

In Circuit Court of the United States, holding sessions at Dallas, Texas, January Term, 1892.

UNITED STATES OF AMERICA,
NORTHERN DISTRICT OF TEXAS.

To the Honorable the Judges of said Court:

Now come the plaintiffs by their attorneys, and by leave of the court first had and obtained, file this their second amended original petition, in lieu of and as a substitute for their original petition, filed on the 11th day of November, 1890, and for their first amended original petition filed May 23rd, 1891, and for amendment, say:

May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, complaining of the Texas and Pacific Railway Company, respectfully represent that the plaintiffs, May Gentry, Olive Lee Gentry and Thomas M. Gentry, reside in the county of Howard, State of Texas, and the plaintiff, Mary A. Gentry, resides in the county of Pettis, State of Missouri; and the defendant, the Texas and Pacific Railway Company is a corporation duly created and acting as such under and by virtue of the laws of the Congress of the United States of America, and has
2 an agent and place of business in said county of Dallas, State of Texas, and one J. W. Ayers is the local agent of said defendant in said county.

That heretofore, to wit: On or about the 13th day of March

A. D., 1890, the defendant was engaged in running and propelling cars over its railroad extending from the city of Marshall, county of Harrison, to the city of El Paso, county of El Paso, State of Texas, and passing through the counties of Dallas and Howard, in said State; and while so engaged, at Big Springs Station, in said Howard county, by its servants or agents, or other representatives acting for said corporation, so carelessly and negligently conducted its business, managed and propelled said cars, that by such carelessness and negligence sa d cars ran against, knocked down and ran over one Louis D. Gentry without any fault or neglect on his part, wounding and lacerating his body, and otherwise injuring him, so that the said Louis D. Gentry then and there, in consequence, and by reason of said injuries, on sai t 13th day of March, A. D., 1890, died.

That the said L. D. Gentry, left surviving him the plaintiff, May Gentry, who is his widow and 26 years of age; and the plaintiffs, Olive Lee and Thomas M. Gentry, who are his children, the former six and the latter two years of age, and the plaintiff, Mary A. Gentry, who is his mother, but left no surviving father. That the said Louis D. Gen ry, at the time of his death, was 35 years of age, and earning a regular salary of one hundred and seventy-five dollars per month, and had been, for the past ten or twelve years, contributing to the support of his said mother, the sum of about three hundred dollars per annum; and would have continued to contribute to her support the same sum of money during the life of his said mother, who was seventy-five years of age at the time of the death of said Louis D. Gentry. That said Louis D. Gentry was a man strong and sound in mind and body, of sober exemplary habits, industrial and skilful in his trade, and the sole and only support and protector of the plaintiffs.

That by reason of his death, caused and occasioned by the defendant as aforesaid, damages have resulted to
3 the plaintiffs in the sum of twenty thousand dollars.

2nd. Plaintiffs further aver that on or about the said 13th day of March, A. D., 1890, said L. D. Gentry was in the employ of the defendant corporation as an engineer on its regular passenger train, running between Big Springs, in said county of Howard, and Toyah, in the county of Reeves, State of Texas, and was employed and being paid by the defendant for the number of miles actually run by him on the road of defend-

ant as such engineer. That said L. D. Gentry had brought his regular passenger train into Big Springs from Toyah, at about six o'clock in the morning of said 13th day of March, A. D., 1890, and was off duty during said day, and the schedule time for him to go on duty again was when said regular passenger train was to leave Big Springs for Toyah, at twenty-five minutes past nine o'clock on the evening of said 13th day of March 1890, when he would have again resumed his actual labor and services for defendant as aforesaid.

That at the hour of about fifteen minutes past eight o'clock on the evening of said 13th day of March, said L. D. Gentry left his residence on the south side of the track of the defendant's road, at said Big Springs, for the purpose of going to and taking charge of his engine to pull defendant's said regular passenger train from Big Springs to Toyah, at the hour of twenty five minutes past nine o'clock, as aforesaid.

That the said regular passenger engine, which said Gentry was to take charge of as aforesaid, was standing at its usual and customary place, on a switch, on the north side of the yards of the defendant at Big Springs, and in order to reach said engine, said Gentry was compelled to, and did start to pass over and cross several switches and the main track in the yards of defendant; and while so passing across said yards, as he and all the other employees of defendant at Big Springs had been in the habit of doing for the past nine or ten years, along the usual and customary path, pass-way or crossing, over and through said yards, at between the hours of twenty minutes past eight o'clock and nine o'clock at night on said day, the said Gentry was, before going on duty and begining his actual services as such engineer, through and by the carelessness
4 of the defendant, its agents, employees and servants or other representatives acting for said corporation and without any fault or negligence on the part of said Gentry, run down and killed by a flat car coupled in front of a locomotive that was being used by the defendant for switching purposes, while moving westward on the main track of defendant's road in said yards. And said flat car and locomotive were so unskilfully, carelessly and negligently constructed, handled, operated and propelled by the defendant, its agents, employees, servants and other representatives acting for defendant, in this: That well knowing the dangerous character of said locomotive and flat car

as an appliance for switching purposes, the defendant had carelessly and negligently failed to place any headlight, lantern or lights of any kind, or any other signal of danger, or any man to watch out for employees on said car, to give warning of its dangerous character, and had carelessly and negligently failed to adopt and establish any rules and regulations by which those of its servants and employees working in its said yard, or whose duty required them to pass through, over or across its said yard on dark nights, might know or be advised and warned of the approach of its cars upon its tracks in said yards, and thus be enabled to avoid the danger of being injured by the running of said cars; and also had carelessly and negligently failed to sound the whistle or ring the bell of said locomotive when approaching said pathway or crossing; and a so had carelessly and negligently failed to have any headlight, or other light or watch on said flat car, or to have the headlight of said locomotive so arranged that the rays of light therefrom were reflected down upon said flat car, but the same was so negligently and unskilfully arranged that the rays of light passed entirely over and beyond said flat car and left it in complete darkness and obscurity; and also had carelessly and negligently failed to have any lanterns or lights of any kind in or about the yards of defendant, or along said crossing; so that the said L. D. Gentry, not knowing that said road engine and flat car were being used for switching purposes, and not being able to see said flat car on account of the darkness of the night, and being blinded by said headlight on said engine, and not hearing the whistle or bell of said locomotive, and not knowing anything of the use and danger of said locomotive and flat car as an appliance for switching purposes, and without any fault or negligence whatever on his part, while passing along said usual and customary crossing through the yard of defendant as aforesaid, and while in the act of crossing the main track in said yard, was run upon, knocked down and run over by said flat car, and his body so badly wounded, injured, mangled and torn thereby, that he then and there instantly died, by reason of such injuries. That the engine which was being used by the defendant for switching purposes on the said occasion, was an ordinary heavy road engine with pilot on in front, and was wholly unsuitable and unfit for such purpose, and in order to make it at all useful for such purpose, the

defendant coupled in front of said engine an ordinary flat car, and said L. D. Gentry did not know of the use of said ordinary road engine by the defendant with flat car coupled in front of it; for switching purposes as aforesaid, and did not know of the extremely dangerous character of such appliance, but the defendant did know that such appliance was extremely dangerous and hazardous, and wholly unsuited for the purpose for which it was then being used, or ought to have known the same, and persisted in using the same instead of a regular switching engine manufactured for such purpose, and which would have been much more suitable and a great deal less dangerous than said road engine with flat car coupled in front of it, as aforesaid.

Plaintiffs further aver that said road engine could have been made much less dangerous than it was, by removing the pilot from the front thereof and putting on in its place steps and a draw-bar and coupler, thus avoiding the necessity of using said cumbersome and dangerous flat car in front of said engine to facilitate the work of coupling; or by placing lights or lanterns, or a watchman on the front of said flat car, but which the defendant wilfully and negligently failed to do, as it was in law bound to do

And plaintiffs further aver that the failure of the defendant to supply and furnish the proper and suitable machinery and appliance for switching purposes as aforesaid, and the failure of defendant to place a head-
6 light, lanterns or lights of any kind on said flat car as aforesaid, and the failure of defendant to have said headlight on said engine properly constructed so that the rays of light therefrom could have been deflected down from said flat car as aforesaid, and the failure of defendant to sound the whistle or to ring the bell of said engine when approaching said crossing or pathway as aforesaid, and the failure of defendant to remove the pilot from said engine and put on in place thereof steps and draw-head and coupler, instead of said dangerous flat car as aforesaid, and the failure of the defendant to adopt and establish such rules and regulations as were suitable and necessary to protect the said L. D. Gentry from being run down and injured by the cars in its yards as aforesaid, by reason of all of which the said L. D. Gentry lost his life, was all owing to and on account of the willful omission and gross negligence of the defendant to perform its plain duty in and concerning the prem

ises, whereby the plaintiffs have suffered actual damages on account of the death of said L. D. Gentry as aforesaid, in the sum of twenty thousand dollars, and whereby the plaintiffs May Gentry, Olive Lee Gentry and Thomas M. Gentry have suffered exemplary damages by reason of the willful omission and gross negligence of the defendant as aforesaid, in the sum of ten thousand dollars. Which sums of money the defendant is justly due and owing to the plaintiffs as aforesaid, but which said sums of money or any part thereof the said defendant has hitherto failed and refused and still fails and refuses to pay plaintiffs, to their damage in the sum of thirty thousand dollars.

Plaintiffs further aver that the plaintiffs Olive Lee and Thomas M. Gentry are minors, and the plaintiff May Gentry, their mother, prosecutes this suit as their next friend, for their use and benefit as well as for her own use and benefit.

Wherefore plaintiffs pray that the defendant be cited to answer this petition, and that on final trial hereof they have judgment against the said defendant for their said damages and all costs of suit.

CHAS. I. EVANS,
S. H. COWAN,
Attorneys for Plaintiffs.

7 The foregoing has the following endorsement, to-wit: No. 1377. May Gentry et al. vs. The Texas and Pacific Railway Company. Plaintiffs' second amended original petition. Filed Feb. 11, 1892. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

Petition for Removal.

Filed April 24, 1891.

District Court, Dallas County, Texas.

MAY GENTRY ET AL., *vs.* THE TEXAS & PACIFIC RY. CO. } No. 8543.

To the Honorable District Court of Dallas County, State of Texas:

Your petitioner, the Texas and Pacific Railway Company, respectfully shows that it is a private corporation, duly incorporated by and organized under an act of the Congress of the United States, entitled "An Act to incorporate the Texas and Pacific Railway Company, and to aid in the construction of its

road, and for other purposes," approved March 3, 1871, and an act of the Congress of the United States supplementary to the aforesaid act, entitled "An Act supplementary to an act entitled an act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes, approved March 3, 1871," which said supplementary act was approved May 2, 1872. By said supplementary act the name of your petitioner was changed to and made "The Texas and Pacific Railway Company, and petitioner says that this suit, and its defense thereto is one arising under the laws of the United States, in this, to-wit: the aforesaid acts of Congress—its charter.

That said suit is of a civil nature, it being an action at law by plaintiffs against defendant for damages, as shown by plaintiff's petition.

That the matter and amount in dispute in said suit exceeds, exclusive of interest and costs, the sum or value of two thousand dollars.

And your petitioner offers herewith a bond, with good and sufficient surety for its entering in said Circuit Court of the United States on the first day of its next session, a copy
8 of the record in this suit, and for paying all costs that may be awarded by said Circuit Court, if said court shall hold that this suit was wrongfully or improperly removed thereto. And your petitioner prays this Honorable Court to proceed no further herein, except to make an order for the removal of this cause to said Circuit Court, and to accept the said surety and bond, and to cause the record herein to be removed into said Circuit Court of the United States in and for the Northern District of Texas.

R. S. LOVETT,
Attorney for Petitioner.

The foregoing has the following endorsement, to-wit: 1,377. No. 8543. May Gentry et al. vs. the Texas & Pacific Railway Co. Petition for removal. Filed Jany, 9, '91. J. H. Stewart, Clerk. By R. M. Hodges, Dy. Filed April 24th 1891. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

Bond for Removal.

Filed Apr. 24, 1891.

District Court, Dallas County, Texas.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RY. CO. } No. 8543.

Know all men by these presents, that we, the Texas and Pacific Railway Company, as principal, and B. P. Fakes and C. A Keating, as sureties, are held and firmly bound unto May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, in the sum of five hundred dollars, for the payment whereof well and truly to be made unto the said May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, their heirs and assigns, we bind ourselves, our heirs, representatives and assigns jointly and severally firmly by these presents. Yet upon these conditions: The said the Texas and Pacific Railway Company, having petitioned the District Court of Dallas County, State of Texas, for the removal of a certain cause therein pending, wherein May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry are plaintiffs, and the Texas and Pacific Railway
9 Company is defendant to the Circuit Court of the United States in and for the Northern District of Texas.

Now if the said Texas and Pacific Railway Company, your petitioner, shall enter in the said Circuit Court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said Circuit Court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void, otherwise in full force and virtue.

Witness our hands this 8th day of January, 1891.

THE TEXAS & PACIFIC RAILWAY COMPANY,
By R. S. Lovett, Attorney.

B. P. FAKES,
C. A. KEATING.

The foregoing has the following endorsement, to-wit: 1377. No. 8543. May Gentry et al vs. The Texas & Pacific R'y Co. Bond for removal. Filed Jany. 9, '91. J. H. Stewart, Clerk. By R. M. Hodges, Dy. Filed Apr. 24, 1891. J. H. Finks, Clerk. By Charles H. Lednum, Deputy.

Agreement to File Papers in U. S. Court.

Filed April 24, 1891.

Dallas County, District Court, 44th District.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No.

It is hereby agreed by and between the plaintiff and defendant that the original papers filed in the District Court of Dallas county in this cause may be filed in the United States Circuit Court for the Northern District of Texas at Dallas before the May term, 1891, thereof, in lieu of a transcript of such papers and proceedings of said cause in said State court.

CHAS. I. EVANS,
Attorney for Plaintiff.
R. S. LOVETT,
Attorney for Defendant.

The foregoing has the following endorsement, to-wit:
10 No. 1377. May Gentry et al. vs. The Texas & Pacific R'y Co. Agreement to file papers in the United States Court. Filed April 24, 1891. J. H. Finks, Clerk. By Charles H. Lednum, Deputy.

Order of Removal.

Filed April 24, 1891.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RY. CO. } No. 8543.

This entry is made as of January 12th, 1891.

On application of defendant this case is removed to the U. S. Circuit Court for the Northern District of Texas. Bond approved. Leave granted on application of both parties to file original record in the case in the Federal Court in lieu of a transcript therefor.

THE STATE OF TEXAS, }
County of Dallas. }

I, J. H. Stewart, clerk of the District Court in and for Dallas county, do hereby certify that the above and foregoing is a true and correct order made in the above entitled and numbered cause as the same appears of record in book No. ——,

page 365, minutes of the District Court of the 44th Jud'l Dist. of Texas.

Witness my official seal and signature this April 22nd, 1891.

(SEAL.) J. H. STEWART,
Clerk of the Dist. Court, Dallas County.
By R. M. HODGES,
Deputy.

The foregoing has the following endorsement, to-wit: No. 1,377. In the United States Circuit Court at Dallas. May Gentry et al. vs the Texas & Pacific Railway Co. Order for removal. Filed April 24, 1891. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

Answer of Defendant.

11 Filed May 22, 1891.

In U. S. Circuit Court, Northern District of Texas at Dallas.

MAY GENTRY ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1377.

Now comes the Texas and Pacific Railway Company, by attorney, and for answer, demurs to plaintiffs' petition and says the same is insufficient in law; and of this it prays judgment of the court.

And further answering in this behalf defendant specially excepts to so much of said petition as claims on behalf of plaintiffs A. Gentry, Olive Lee Gentry and Thomas M. Gentry, the sum of $10,000 as exemplary damages, because said petition shows no facts which render defendant liable to such damages.

And for plea in th s behalf, defendant comes by attorney and denies all and singular the allegations in plaintiffs' petition contained, and demanding strict proof thereof, puts itself upon the country.

And for further plea in this behalf this defendant says that if L. D. Gentry was killed at the time and place alleged by plaintiffs, his death was contributed to and caused by his own execuable negligence and carelessness in going in and upon defendant's yards and tracks, and failing to exercise his sense of seeing and hearing which would have revealed the approach of any engine or train upon said track, and in placing himself in a place of danger without observing any acre or regard whatsoever for his own safety, and but for such negligence on the

part of said Gentry, his death would not have occurred at the time and place stated; and these facts defendant is ready to verify.

And for further plea in this behalf defendant says that the regular switch engine used in its yards at Big Springs had shortly before the time mentioned in plaintiffs' petition, become out of repair, and it was necessary to discontinue the use of the same temporarily in order to repair the same; that one switch engine is amply sufficient to do the work at Big Springs; that said switch engine having
12 unavoidably become out of repair and temporarily disabled as aforesaid, during such time a road engine was used for switching purposes, until the switch engine could be repaired; that in order to lessen the danger to switchmen and other employees working therewith, a flat car was coupled to the front end of such engine while being used for switching purposes; that it is usual and customary and entirely proper, and is well known to all persons engaged in railway service, and especially to locomotive engineers, as was L. D. Gentry, that when switch engines are temporarily disabled road engines are used for switching purposes until the switch engine is repaired, and that when a road engine is used temporarily for such purpose a flat car or coal car is coupled to the front end thereof, and that such arrangement lessens the danger to switchmen and others working therewith that would arise otherwise from frequent couplings of the front end of the engine to cars, and that such arrangement, and the reason and effect thereof was well known to said L. D. Gentry; that the engine and car referred to in plaintiff's petition were in all respects proper for the purposes for which they were being used, were in good condition, properly equipped with lights, bell and whistle, and all other appliances for safety, and defendant was guilty of no negligence in the premises whatever.

Defendant avers that if the death of said L. D. Gentry was caused, or in any way contributed to, which it denies, by the negligence of any person or persons whomsoever, other than himself, and if there was any negligence in failing to give signals, or to warn said L. D. Gentry of the movement and position of said car and engine, it was the negligence of a fellow-servant or servants of said L. D. Gentry, being in the same general employment and service and under the same management and

control and in the same department, whereunder and wherein the said L. D. Gentry was employed, for which defendant is in no wise liable, and this it is ready to verify; wherefore defendant prays judgment.

R. S. LOVETT,
T. J. FREEMAN,
Attorneys for Defendant.

The foregoing has the following endorsement, to-wit:

13 No. 1377. May Gentry et al. vs. Texas and Pacific Railway Company. Answer of defendant. Filed May 22, 1891. J. H. Finks, Clerk. By Chas H. Lednum, Deputy.

Judgment.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RY. CO. } No. 1377.

January 31, 1893.

On January 26. 1893, this cause was regularly called for trial and came the parties, plaintiffs and defendants, by their respective attorneys and announced ready, then came on to be heard the exceptions of the defendant to so much of plaintiffs petition as relates to the claim for exemplary damages and which exceptions upon consideration by the court are sustained, to which ruling the plaintiffs except. Then came a jury of twelve good and lawful men to-wit: J. A. Crawford, A. J. Bridges, J. D. Boardman, J. C. Mauk, T. P. Worthington, S. J. Jones, J. T. Hoket, E. T. Burleson, W. P. Gillean, W. D Hudgins, J. W. Bogar and Volney Caldwell, who were duly and legally elected, empannelled and sworn to try this cause, who having heard the pleadings, evidence, argument of counsel and charge of the court retired to consider of their verdict and thereafter on the 31st day of January 1893, returned into open court the following verdict to-wit:

"We the jury find for the plaintiffs ($10,166.66) ten thousand one hundred and sixty-six dollars and sixty-six cents, apportioned among plaintiffs as follows:

May Gentry, four thousand one hundred and sixty-six dollars and sixty-six cents:

Olive Lee Gentry, two thousand five hundred dollars;

Thos. M. Gentry, two thousand five hundred dollars;

Mary A. Gentry, one thousand dollars.

T. P. WORTHINGTON,
Foreman."

It is therefore considered by the court and it is so ordered and adjudged that the plaintiff May Gentry, do have and recover of and from the defendant, Texas & Pa-
14 cific Railway Company, the sum of four thousand one hundred sixty six dollars and 66-100 ($4,166.66) with interest thereon from this date at the rate of six per cent. per annum, for which let execution issue.

It is further considered by the court and it is so ordered and adjudged that the plaintiff Olive Lee Gentry, do have and recover of and from the defendant Texas & Pacific Railway Company, the sum of two thousand five hundred ($2500.00) dollars, with interest thereon from this date at the rate of six per cent. per annum, for which let execution issue.

It is further considered by the court and it is so ordered and adjudged that the plaintiff, Thomas M. Gentry, do have and recover of and from the defendants, Texas & Pacific Railway Company, the sum of two thousand five hundred ($2500 00) dollars, with interest thereon from this date at the rate of six per centum per annum, for wh ch let execution issue.

It is further considered by the court and it is so ordered and adjudged that the plaintiff, Mary A. Gentry, do have and recover of and from the defendant, Texas & Pacific Railway Company, the sum of one thousand ($1,000 00) dollars, with interest thereon from this date at the rate of six per centum per annum, for which let execution issue.

It is further ordered that said plaintiffs do have and recover of and from said defendant all their costs herein incurred and expended, for which execution may also issue.

It is further ordered and adjudged by the court that the officers of the court and all parties entiled to costs herein, do have and recover of and from said plaintiffs and the sureties on their cost bond Frank J. Smith and H. V. Masters, and of and from said defendants, the costs by plaintiffs and defendants herein respectively incurred, for which execution may also issue.

Defendant's Motion for New Trial.

15 Filed February 2, 1893.

In the United States Circuit Court, for the Northern District of Texas, at Dallas.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1377.

Now comes the defendant in the above entitled cause and moves the court to set aside the verdict rendered in said cause, and grant it a new trial on account of the following errors committed in the trial thereof.

1. The court erred in admitting over the objection of defendant, as complained of in defendant's first bill of exception, the answer of the witness, Ernest Harrison to the 7th cross-interrogatory to the effect that he had frequently seen a white lantern placed at the furthest end of the car from the engine, and saw it done many times at Big Springs.

The ground of defendant's objection being, that the answer of the said witness was not responsive to the question, and further, that it does not appear when he saw those lights, whether before or subsequent to the accident, and evidence to any lights he had seen subsequent to the accident would be prejudicial to defendant and irrelevant:

Which objection the court overruled, and the answer of the witness, as objected to, was read, to which ruling of the court the defendant excepted.

2. The court erred as shown by defendant's bill of exception, in admitting opinion evidence, to the effect that the placing of a light on the end of the flat car would have been conducive to the safety of the other employees in the yard; and that a failure to place it there jeopardized the other employees in the yard, because the evidence of the witnesses should have been confined to facts, and it was for the jury to draw a conclusion from those facts.

3. The court erred in permitting the plaintiffs' witness, R. J. Thompson, to answer the 24th interrogatory addresses to him, to the effect whether the engine and flat car used by the defendant was the latest improved machinery and appliances for switching purposes and if not
16 state what kind of machinery and appliances would have been more appropriate and less dangerous. His answer being, "it was not a regular switch engine." The ground of defendant's objection being, it was not the duty of defendant to provide the latest appliances, but only to use ordinary care, as shown by bill of exception.

4. The court erred in admitting the evidence of plaintiffs' witness, A. B. Perkins, as objected to and as contained in his answer to the 12th interrogatory, as shown by bill of exception.

5. The court erred in admitting the testimony of plaintffs' witnesses, Mike Moilett and Frank Hays, in answer to the 4th interrogatory, as shown by bill of exception.

6. The court erred in admitting evidence of plaintiffs' witnesses, to the effect that plaintiff's husband was killed by being run over by a flat car at Big Springs: the ground of defendant's objection being that the witnesses were not present and did not see the accident, to which defendant excepted and reserved its bill of exceptions.

7. The court erred in refusing to give defendant's 6th special instruction, directing a verdict for defendant, because, under no phase of the case did the evidence warrant the submission of the case to the jury, as shown by defendant's bill of exceptions.

8. The court erred in refusing defendant's 1st special instruction, to the effect that it was the duty of deceased, in crossing defendant's track, to look and listen for passing engines, cars or trains, and if he failed so to do they should find for the defendant.

9. The court erred in refusing defendant's 2nd special instruction, to the effect that the evidence showing Gentry knew, or if he had exercised ordinary care, would have known, of the appliances used, and thereby assumed the risk incident to the use of the engine and flat car, all of which is shown by defendant's bill of exception.

10 The court erred in refusing to give defendant's 5th special instruction, directing a verdict for the defendant on account of the contributory negligence of the deceased, as shown by defendant's bill of exception.

11. The charge of the court, as submitted, was erroneous in this it failed to instruct the jury as to the degree of care incumbent on the deceased in crossing defendant's
17 track; and it did not instruct the jury as to what degree of care was required of him, except that he assumed the risk naturally incident to crossing the railroad track, to which defendant excepted and tendered a proper special charge.

12. The court erred in the 5th paragraph of its charge in exonerating the defendant from liability only in case the deceased had full knowledge of the effect and want of adapta-

bility of the machinery, for the reason that if there was any defect it was patent to the deceased and he had every opportunity to observe and was chargeable with notice of patent defects, if any such existed, and the use by the court of the term "full knowledge," was doubtless misleading and confusing to the jury, which is complained of in defendant's bill of exception No.——

13. The charge of the court was erroneous in the 1st paragraph in which the court stated that it was an established fact that deceased was killed by the flat car of defendant, propelled by its switch engine at Big Springs. The evidence warranted no such instruction from the court, on the contrary, there was evidence that a freight train pulled out a short time before the deceased was discovered, and over the same point of the track where he was found. The only evidence to the effect that he was killed by the flat car was objected to by defendant as incompetent and irrelevant, because it was strictly heresay, the party testifying having stated that he was not present until an hour or more after the accident occurred, to which defendant excepted and tendered a special charge.

14. The court erred in paragraph 4 of its charge in confining the instruction of the jury to the evidence only as to the custom of this particular road in its use of flat cars; the evidence admitted, without objection, showing the custom as to many roads in the State of Texas, as well as of other parts of the Union, using a similar appliance as to that used by defendant on the occasion in question, to which defendant excepted and tendered a proper charge.

15. The verdict was contrary to the law and the evidence, because, under the evidence, defendant was not guilty of a want of care in the use of the road engine and
18 flat-car, under the circumstances, and under the direction of the court, as submitted in the 6th paragraph of its charge, the verdict should have been for the defendant.

16. A fair and reasonable presumption from all the evidence was, that the deceased, not only assumed the risks incident to the service by undertaking his employment with defendant, but on this particular occasion, in the exercise of the degree of care which the law imposes upon a person crossing a railwas track, he must have discovered the approach of the flat car and engine—if that was the occasion of his death—in time

to have avoided it.

17. The court erred in giving plaintiffs' special charge to the effect that it was not incumbent on deceased to use diligence to ascertain defects in appliances because the defects, if any existed, were patent, and it is the duty of an employee to use ordinary care to observe patent defects, and the charge was misleading.

ALEXANDER, CLARK & HALL,
T. J. FREEMAN,
Defendant's Attys.

The foregoing has the following endorsement, to-wit: No. 1377. In the U. S. Circuit Court for the Northern District of Texas. May Gentry et al. vs. Texas & Pacific Rwy Co. Defendant's motion for a new trial. Filed February 2, 1893. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

Order Overruling Motion for New Trial.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1377.

February 6th, 1893.

On this day came on to be heard the motion of the defendant for a new trial herein and the court having heard and considered said motion and the argument of counsel thereon and being fully advised is of the opinion that said motion is not well taken, and it is ordered and adjudged by the court that said motion be and the same is hereby overruled and a new trial refused herein.

Order Allowing Defendant 30 Days to File Bill of Exception.

19 MAY GENTRY ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1377.

February 6, 1893.

Under the application of the defendant it is ordered by the court that the defendant have and be allowed thirty days from this date, within which time to prepare, submit and file its bill of exception herein.

Bill of Exceptions.

Filed March 7, 1893.

In the U. S. Circuit Court, for the Northern District of Texas, at Dallas.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RY. CO. } No. 1377.

Now comes the defendant, Texas & Pacific Railway Company, by its attorneys, and presents to the court its bill of exceptions herein, which is allowed, signed and ordered to be filed and made a part of the record herein, which bill of exceptions is as follows, to-wit:

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RY. CO.

Be it remembered, that on this the 26th day of January, 1893, the above entitled cause coming on to be heard in the Circuit Court of the United States for the Northern District of Texas, at Dallas, Honorable John B. Rector, District Judge, presiding, and a jury having been empannelled, the following proceedings were had. Plaintiffs introduced the following evidence:

I.

Mrs. May Gentry, who testified:

I am the plaintiff, May Gentry, and the widow of L. D. Gentry, who died on March 13th, 1890. I last saw him on the night of March the 13th, 1890, about 8 o'clock when he was called to go to his engine at the round house
20 in the yard and take out the train from Big Springs to Toyah. About an hour afterwards I heard he was dead. I first saw his body at mother's house. My husband and I lived on the south side of the railroad track at Big Springs. The yard and round-house are on the north side. His engine was always placed for him in the yard opposite the coalchutes. There was a path from our house to the yard, which ran under the coalchutes, and he always went to his engine by way of this path. This was the nearest route. This path existed ever since we were married, 1883. The path was used by employees mostly. I have frequently gone with him on this path in summer time, as far as the main track. The night of March the 13th was dark and cold. My husband had an overcoat on when he left home. When he was killed his watch was broken and some keys and money that he had in his pocket were bent. They were bent in an oval shape and looked like they had been run over

by a train At the time of my husband's death he was 35 years old. He left two children, a girl Olive Lee, then five years old, a son, Thomas Marion then 16 months old. At the time of L. D. Gentry's death his father was dead, but his mother, Mrs. Mary Gentry, was living; at that time she was 75 years old. She lives at Sedalia, Missouri. My husband was and had been locomotive engineer in the employment of the T. & P. Railway Company since I first met himin1881. He was paid so much a mile run by him, about 3 1-2 cents. He made from $150.00 to $175.00 per month. He was a careful frugal man and provided his family with all the food and clothing we required. Out of his salary he would spend about $75.00 or $100.00 per year for clothes, $5.00 per month for room rent at the other end of his run and 75 cents every other day for meals there a day. He contributed to his mother's support $15.00 to $25.00 every month. never less than $15.00. My children and myself had no other means of support besides the labor of my husband. Since his death I have made a living dressmaking. He was kind, fond of his family and a man likely to have reared his children well and give them a good education. In his lifetime, as soon as he got to Big Springs off his run, which was about six o'clock in the
21 morning, he would generally register at the round-house and then come home and would not return to the round-house that day. If he come home before registering he would return to the round-house some time during the day and register. On March the 13th, 1890, he went down to the round-house in the yard about 3 o'clock. He went there to see about some repairs on his engine. He returned home in about an hour. His train left at night at 9:25. He spent every other day at home and every other day in Toyah. Our expenses were about $50.00 per month. $800.00 or $900.00 would cover everything we spent, and that he contributed to his mother's support. My husband was a healthy, vigorous and stout man. At the time of his death I was 25 years old. I was and am healthy and sound and of good constitution.

II.

Plaintiff introduced the deposition of *Earnest Harrison*, who testified as follows:

On the 13th of March, 1890, I was in Big Springs, Texas, and was an apprentice at my trade, that of machinist in the shops

of the T. & P. Railway Company. I knew L. D. Gentry, and found him on that day lying on his back across one of the railroad tracks of the defendant company about 8:55 o'clock P. M. I was walking down the middle of the track when I discovered him. I think I was the first person who discovered the body of L. D. Gentry after his death. It was near the coalchute in Big Springs, Texas, about 8:55 in the evening. The body was beginning to get cold in death. I do not know by what means he lost his life, as a positive fact, but am morally certain it was by reason of the wheel of the car, or cars having passed over him. His body was nearly cut into at the hips. I saw the road engine and flat car that was being used for switching purposes in said yard on said night, and there was no light on said flat car. I have been six years in railroad service, and I have never labored in any capacity save that of machinist. It would have been conducive to the safety of the other employees to have placed a light on the end of said flat car farthest from the engine L. D. Gentry's engine was waiting for him on the round-house track the night he was killed, and he was killed on
22 almost a direct line from his home to his engine. I think he was killed while walking across the track from his home to the engine.

On cross examination witness testified:

I reside at Yoakum, Texas. My Business is that of machinist in the S. A. & A. P. Rwy shops here. I have resided here about six months and have worked at my trade about five and a half years. I was not present when Gentry was struck. I do not know when he was struck. Life was barely extinct when I reached him. He was not quite cold. I know it because I felt him. There was a head light on engine 68 on the night of the 13th of March 1890. By one in front of it on the track it could have been seen several miles. The rays from the head light would strike twenty feet from the engine. On the side where Gentry's home was one could not see the head light at all when ten feet away from the track on account of the under timbers of the tramway of the coalchute intervening. Right on the track and at the point ten feet on the opposite side the head light could have been seen for about half a mile or to the curve. Road engine 68 was being used in the yard for switching because the switch engine was temporarily disabled. I do not know why said flat car was coupled on, but I think it was for

the safety of the switchment and parties working with said engine. It was the custom to use a road engine in place of a switch engine when the latter is disabled, and I have seen road engines used for switching purposes in the yards here, without any other car being attached I do not know whether L. D. Gentry knew of the custom or not, but he was an old railroader and had abundant opportunities to know it. I think he had seen the road engine used at Big Springs a good many times, as he had been there as engineer for five years or longer, and I know it had been many times used while he was there. I have never in my life seen a head light placed on the flat car, but have frequently seen a white lantern so placed at the furthest end from the engine, and saw it done many times at Big Springs. It is the usual custom that when a regular switch engine is being used for switching purposes to couple cars at
23 times to both ends of said engine, and cars are coupled about as often to one end of such engine as to the other.

To the the testimony of the said witness, as follows: 1. "I think he (L. D. Gentry) was killed while walking across the track from his home to the engine," when the same was offered, the defendant then and there objected, on the ground that the witness was not present when L. D. Gentry was killed, and did not see or know how he met his death, as shown by the witness' evidence, hence the statement objected to was a mere guess and inadmissible.

2. "I have never in my life seen a headlight placed on the flat car, but I have frequently seen a white lantern so placed at the farthest end from the engine and saw it done many times at Big Springs," when the same was offered the defendant then and there objected, on the ground that the same was inadmissible, not being responsive to the interrogatory, which was as follows:

7th Cross Int:—"If in answer to the 7th direct interrogatory you say that a headlight placed on the end of the flat car farthest from the engine referred to would conduce to safety, please state if it is not a fact that you have never, in all the experience of your life seen a headlight fastened on the front end of a flat car which was coupled to a road engine while used for switching purposes? If you ever saw it, please state when and where, upon what road and under whose supervision? Have you ever seen it more than once, and if so, please specify each time and place where you saw it?

And on further ground that witness does not show when and where he saw such white lantern so placed, whether on this car or some other car, or whether before or after this accident. that the said objections were overruled by the court, and to the said ruling the defendant then and there excepted, and this its bill of exceptions was tendered and allowed and signed and sealed by the judge holding said court.

III.

Plaintiff introduced the depos tion of *Jake Mittle*, who testified as follows:

I was fireman on engine 68 that was being used for
24 switching in the Texas & Pacific Railway yards at Big Springs the night that L. D. Gentry was killed. A flat car was coupled in front of the engine, and was being used for switching. The engine and flat car moved westward down the main track to about where the body of Gentry was found, about 8:30 o'clock in the evening. This was the last trip made to this point during that night. About the time that this switch engine was on the last trip a freight train usually left for the west. When it did it ran in on the main track from a switch near the ticket office, and when the train got on the main track it usually stopped a short time for the rear brakeman to turn the switch and get on the caboose. When it did so stop the caboose was at the switch and the train was usually long enough for the engine pulling it to be opposite the coalchute, just eastward about fifteen feet from where Gentry's dead body was found. At the time I made this last trip with my engine and reached the point about where Gentry's body was found my engine was going very slow, in fact, had come nearly to a full stop. The bell was ringing constantly and the headlight upon my engine was shining brightly, and if Gentry was run over by t is flat car I was not aware of the fact and did not know that he had been run over until some time afterwards. The rules of the company at Big Springs at that time required me to keep the bell ringing while switching in the yards. This was for the purpose of notifying parties working in the yards that the train was approaching. It was customary to use a flat car in front of a road engine for switching when the regular switch engine was temporarily out of repairs. There was no lantern on the flat car and there was no one on the flat car.

IV.

Plaintiff introduced in evidence the deposition of *Steve Ord*, who testified as follows:

My name is Steve Ord. I am 23 years of age. I reside at Big Springs, Texas. I knew L. D. Gentry. He is dead. I do not know where he died, but his body was found across the north rail of the main track of the T. & P. Railway in the Big Springs yard, opposite the coal-chute. I do not know anything about it of my own
25 knowledge. In March, 1890, I was runing engine 68 in Big Springs yard. There was a flat car coupled ahead of engine 68. There was no light ahead except the headlight which was on the engine. I do not know by whose orders said engine was being used. I do not know by whose orders the flat car was coupled in front of said engine on that night. I do not know whether any other engine than number 68 with a flat car passed through the yards of said railroad at Big Springs on the night of March the 13th 1890, between 8:30 and 9 o'clock. I do not know of a path or pass-way leading across the yards of said road at Big Springs from south to north. Between the hours of 8:30 and 9 o'clock P. M. on March the 13th 1890, I crossed no pathway with my engine that I know of As to whether or not we sounded the whistle or rung the bell when the engine approached said pathway that night, we always ring the bell when moving. The headlight from the engine struck the far end of the flat car. The night that Gentry was killed it was dark and cloudy. Said flat car could not be easily seen by a person standing near the track in front of said engine 30 or 40 feet, on that particular night on account of the headlight. I do not know how far from the path above inquired about Gentry's body was when first found, and I do not know which side of said path it was on. I did not observe any sign of the body having been dragged between the point where it was found and said path. I examined the trucks on the car and engine, and I found in my judgment, blood on trucks of cars and some on pilot. This examination was made after the accident. I suppose the flat car was coupled in front of the engine for the convenience of the switchmen. The difference between the said engine No. 68 and a regular switch engine is, that one has a pilot and the other has steps and railing on each end. The road engine with pilot is the most dangerous of the two. I dont know what was the habit of said L.

D. Gentry when off duty relative tobeing about the yard in the day time. I did not see him in the yard on March the 13th, 1890, prior to the time he was killed. I do not know whether or not Gentry knew of engine 68 being used for switching. Engine No. 68 was switching in the west end of the yard on March the 13th, 1890, between 8:30 and 9 o'clock P. M. The engine
26 was headed west and the flat car was in front of the engine To the best of my judgment were moving about 5 miles an hour when we made the last trip westwardly along by the coal-chute just before the finding of L. D. Gentry's dead body. On the last trip westwardly my engine stopped about the place where Gentry's body was found. As to which track my engine was moving on at the time Gentry was struck, as above stated, I do not know when Gentry was struck. I was engineer in charge of the switch engine 68 on the night Gentry's body was found. There was a headlight on the engine to which the flat car was coupled. The headlight was burning brightly. I do not know how far it could be seen. The front end of the flat car was clearly visible to a man behind the head light, The rays of the light of the headlight fell on the car 15 or 20 feet in front of the engine and made objects visible to one behind the headlight. Yes, the bell upon said engine was kept ringing while moving about the yard on the night Gentry's body was found. The rules of the company required it to be kept ringing while the engine was in motion. It was right and proper to couple a flat car in front of a road engine when said engine was being used for switching purposes, as it lessened the danger to switchmen and others, by avoiding the necessity for frequent couplings of the front end of the engine to the cars. There was no light on the headlight when Gentry's body was found, nor prior thereto. The headlight on the engine upon the night in question was amply sufficient to light up the car and track in front and render unnecessary any other light on the car.

V.

Plaintiffs introduced in evidence the deposition of *Anton Withholder*, who testified as follows:

My name is Anton Withholder. I am 23 years of age, and I reside at Big Springs, Texas. On the 13th day of March 1890, I was engaged as a fireman. I knew Louis D. Gentry, he is dead. He died on the main track of the T. & P. Railway Company in the yards at Big Springs March the 13th

1890, at least his body was found there, which had been run over by a car. Prior to his death L. D. Gentry resided on the south side of the railroad track.
27 I know of no pathway across the the yards. It ends at the track. This path has been used five years to my knowledge No officer of the Texas & Pacific Railway Company has ever objected to the use of said pathway or crossing by the employees of said company. The body of Gentry was found ten or fifteen feet west of said pathway on the north side of the track. There was no light that I saw near this place on the night of the 13th of March 1890. On the night in question it was dark. L. D. Gentry was in the habit of crossing at said pathway near where his body was found, This had been his custom since I began firing for him, which was about twelve months. When I first heard of Gentry's death I was doing my work on the engine ready to go out. The engine was northwest of Gentry's residence, near the place his body was found. This path was the nearest route to his engine. A road engine number 68 doing switching was in the west part of the yard between 8:15 and 9 o'clock the night Gentry was killed. No other engine passed that I know of between 8:15 and 9 o'clock on that night. A road engine was being used for switching purposes that night. There was a flat car coupled in front of said engine. I dont know the length of the flat car. There was no light on said flat car. The object in coupling said car in front of said engine was for the benefit of switchmen, I suppose. A person standing by the side of the track in front of said engine could not see the flat car on account of being blinded by the headlight. The light did shine on the end of the car and could be seen by a person behind the headlight. The difference between the road engine that was being used on that night for switching purposes and a regular switch engine is, road engine has pilot and one headlight and switch engine has foot steps and two headlights. The road engine is most dangerous for switching purposes. L. D. Gentry went on duty about 8 o'clock P. M., and went off duty at 5:52 o'clock A. M. when in Big Springs, if his train was on time. His train was due to leave Big Springs at 9:25 o'clock P. M. L. D. Gentry was not about the yard but very little when off duty in Big Springs, as he did all his work while at Toyah. L. D.
Gentry's duty was that of an engineer and he run between
28 Big Springs and Toyah, Texas. He was employed by the

company by the mile, and paid by the mile, at the rate of 3 1-2 cents per mile. His earnings per month were about $150 00 up to his death. L. D. Gentry was a very careful engineer and his reputation was first class in every respect. His reputation as to sobriety and industry was first class.

I don't know but one path leading to the Texas & Pacific railroad track at Big Springs at the coalchute. Gentry's body was found across the north rail of the main track. A foot track that had the appearance of being made by Gentry's boot indicated that he had come from under the coal chute. This path is used regularly by employees living south of the round-house, but those living east of the round-house pass to the east of the coal chute. I don't know as to the number that passed. It is not customary to have lights in yards, except signal lamps on switch engines and headlights. A person can see further from behind a headlight on a dark night than he can on a light one, but it blinds a person in front of a headlight more on a dark night than it does on a light night. I have never seen Gentry come to his engine any other route than under the coalchute but have seen him go from his engine towards his house on other routes. The path under the coalchute was the nearest and most convenient route from Gentry's residence to his engine. I had been in the engine fifteen or twenty minutes before the switch engine and cars passed. I saw them, but was not noticing them in particular. I went down east of the coalchute, as I lived in the east part of town, that being the most convenient for me. I was called before Gentry was. The most convenient route for a person depends upon where he is living. There was no light on the flat car when they were switching at the place where Gentry's body was found, as I saw the car pass me. I do not know what moment Gentry was run over and do not, in fact, know what car killed him. I have had something over four years experience as a railroad man. I have been hostler in the yard at Big Springs two or three months I have not often seen switching done with a road engine and car attached. I have seen switch engines pulling and pushing at the same time It
29 is not customary to have lights on both ends of cars, but it is to have brakeman at the point where cars are being coupled. I suppose these facts are known to all engineers and trainmen on railroads and were known to deceased. I will not

undertake to say that the light from the headlight did not strike this car at all. No, it is not a fact that the light from the headlight of the engine would fall on the ground ten or fifteen feet on both sides of the track and along the track for a long distance, so as to make objects in front of the engine on both sides of the track for at least 75 yards visible and easily seen, so that a person standing 50 feet in front of the engine could readily see everything in his neighborhood between him and the engine. I have never switched any, but think when switch engine cannot be used, pilot should be taken off of road engine instead of attaching flat car. L. D. Gentry was at the shops between 2 and 4 o'clock P. M. to see if the work on his engine was done. I don't know what street Gentry lived on. He lived southeast of the place where he was killed. I do not know of any careful and experienced railroad men having been killed by their own carelessness.

VI.

Plaintiffs introduced the deposition of *W. D. Pettibone*, who testified as follows:

I am 38 years old and reside at Big Springs. I know L. D. Gentry. He is now dead. I suppose he met his death on the track of the Texas & Pacific Railway Company at Big Springs, opposite the coalchute. I do not know of a path across the yard. I know of him using a path to the yard to come to his engine in the yard, but the path does not cross the yard. I saw the ordinary road engine with flat car coupled before it being used for switching purposes at the yard of the Texas & Pacific Railway Company at Big Springs on the day of March the 13th, 1890. I saw no lantern or other lights or signals of danger on the flat car on the night of March the 13th, 1890. A person standing in front of the engine beside the track could not easily see the flat car. The engine and flat car was more dangerous for switching purposes than a regular switch engine. The road engine has a pilot and the switch engine has a step in front. I was night hostler in the yard for two months. I would take Gentry's engine when he got into the yard. I noticed the road engine switching about 36 hours before the night of the 13th. I do not know whether Gentry noticed it or not. The headlight was buring brightly and fell on the front end of the car and on the track, making it all clearly visible to one behind the head-

light. It lessens the danger to switchmen to have the flat car coupled in front of the road engine, and this is usually done when a road engine is used for switching purposes.

VII.

Plaintiffs introduced in evidence the deposition of *F. D. Maxwell* who testified as follows:

I am 30 years old, and reside at Big Springs, Texas, yard, employed as yardmaster at Big Springs. At that On March the 13th, 1890, I was switching in the Big Springs time a road engine was being used for switching purposes. It was an ordinary road engine with flat car in front of the pilot. A regular switch engine has a step in front and an ordinary road engine has a pilot in front. I do not think there is any difference as to the danger to employees in the use of a switch or a road engine. The engine that was being used had a pilot on in front and had a flat car coupled on in front of pilot, by order of Mr. S. C. Marks, chief train dispatcher for the Texas & Pacific Railway Company. The coupling apparatus used on that day was an ordinary car coupling; that used on the regular switch engine is a bumper attached to a buffer beam. I do not know the reasons for the difference in such construction. I do not know the length of the flat car nor of the bar of iron in front of the road engine to which the flat car was coupled, nor do I know the we ght of the bar. I was in the yard until 5:30 P M. on said evening, but left before sundown. I do not know whether there was any lights on said flat car that night. The engine had a headlight on it which would shine on the end of the flat car. at the time Gentry was killed I was at home asleep. I I did not know of his being killed and knew nothing of the cause of his death. It is true that when a road engine with a pilot is being used for switching purposes that the
31 safety of the switchmen and others working with such engine require that a flat car be coupled to the front end of the engine. This is usually done in using such an engine, so as to avoid frequent coupling on the front end of the engine which has a pilot to other cars, which is always attended with more danger. I consider that the road engine and flat car was the best arrangement that could have been made at that time. The switch engine was in the round house for repairs. I do not know whether a regular switch engine could have been procured

or not. I have been in the railway business five years. I have seen switching done with road engines a number of times. A flat car is about thirty feet in length. The light from the headlight of t e engine would shine on the car. I do not know how many feet of the car would be shown. I did examine the headlight of the engine on the next night. It was in good shape. It was the usual kind of a headlight. I do not know how far it would throw the light in front of the engine. It is common to have cars attached to both ends of a switch engine. It is not customary to have lights on the cars. The light from the headlight of the engine would shine on the far end of the flat car from the engine.

VIII.

Plaintiffs introduced in evidence the deposition of *R. F. Thompson*, who testified as follows:

I am 38 years old. I reside in Big Springs, Texas. On March the 13th, 1890, I was night for man for the T. & P. round house in Big Springs. I knew L. D. Gentry. He is dead. I knew he was killed at coalchute, on the main line of the T. & P. Railway at Big Springs on the 13th of March, 1890, about 8:30 P. M. I first saw his body lying across the north rail directly opposite the west chute. I am acquainted with the path leading from the south side of town to the yard. It is generally used by employees of the T. & P. Ro d living on the south side of town. I do not know how long it has been so used. Gentry's body was found west of the path about 15 feet The body was almost cut into. The center of his body was on the rail and his feet between the rails. L. D. Gentry lived on the south side of the railroad.

32 To my knowledge he had used the path leading from that portion of the town by the coalchute to the yard for two years. On the night of March the 13th, 1890, a road engine was being used for switching purposes. It was engine Number 68. I do not think this engine passed over the spot where Gentry's body was found that night before the finding of the body. Engine No 122 passed over the spot about an hour before the finding of the body. I examined the trucks and pilot of the engine switching and the car. I found blood on the car trucks and also found what we thought was blood and hair on the pilot about two hours after the finding of Gentry's body. The night was dark and cloudy. There is no pathway across the yard. There was no

light at the coalchute. Gentry's body was found about 8:30 P. M. The road engine has a pilot and a switch engine has not. The one with the pilot is the most dangerous of the two for switching purposes. I do not know who ordered the flat car to be attached to the engine. There were no lights or lanterns or any other signals of danger on the flat car on the night of March the 13th, 1890. The engine had a headlight on it, which was on the front end of the engine to which the flat car was coupled. The reflector of the headlight was so situated that the rays of light would strike the ground about fifteen feet in front of the engine. It would strike the end of the flat car. The headlight had a tendency to blind a man who was in front of it near the track. On the morning of March the 12th, 1890, my business required me to go to the telegraph office to find out how train number 4 was, and in going down the switch engine was standing in front of the switch shanty, with the headlight shining west, burning in good condition, which so blinded me that I did not see the flat car in front of the engine until I struck it. I did see signs of dragging and struggling on the ground where Gentry's body was found. I saw such signs from the pathway to where his body was found. I do not know how long this car had been used for switching purposes. I do not know whether Gentry knew of its being used or not. The regular switch engine would have been less dangerous than the one in use on that occasion. I had known L. D. Gentry eight years prior to his death. He was a sober,
33 careful and industrious man. He was a locomotive engineer. I do not know the length of time he had been engaged in that business. The character and reputation of L. D. Gentry as a careful and skillful engineer was first class. L. D. Gentry lived on the south side of town. The engine L. D. Gentry was going to the yards to take charge of was in the west part of the yard. His body was found about fifteen feet west of the customary route from his home to his engine. I do not know whether he could have conveniently gone another route than the path or not. At the time of his death he was on duty. His train was to leave Big Springs at 9:15 P. M. He came into Big Springs from his trip on the morning of March the 13th, 1890, at 5:50 A. M. For his services as locomotive engineer he was paid by the mile, I think 3 1-2 cents per mile. I do not know how

long the road engine with the flat car in front of it had been used in the yards at Big Springs when Gentry was killed. I do not know whether L. D. Gentry's employment called for him to be about the yards in Big Springs any time or what was his habits generally when in Big Springs off duty about visiting or frequenting the yard. If one was standing in front of the headlight it is difficult to see the flat car. The headlight of the engine, on that night, threw the rays of light on the flat car in front of it. A foot path leads up to the yard but there is no distinct path after you cross the track. There is no path way across the yards that I know of. The land is almost level with the rails. The regular switch engine on March the 13th was in the roundhouse for repairs. I do not know that it was possible to procure another switch engine at that time. It is a common occurrence with railroads to have to use a road engine to do switching, and it is customary for the safety of the switchmen to couple a flat car on the front of the engine to protect men working about the engine from being hurt with the pilot of the engine I have often seen this done. It is commonly known among railroad men as being the safest way to do switching when the switch engine is out of repair. One switch engine was ample under ordinary circumstances to do the switching in the yards at Big Springs. It is not customary to have lights in yards at night except signal lights used on switches. The most of
34 railroad men are familiar with this mode of doing switching, that is with a road engine and flat car. Most engineers, before they become engineers on the road, have been in charge of switch engines in yards. It is a common occurrence for switching engineers to use a car attached to a road engine for switching purposes. I do not know whether Gentry ever run a switch engine or not. I have often seen switch engines with cars attached at both ends. I do not think it necessary to place l ghts on the cars. It is well known to railroad men that cars are frequently attached to both ends of regular switch engines. The car was attached to the engine for the purpose of making it less dangerous for those engaged in switching in the yards at Big Springs. If the switch engine is out of repair and it becomes necessary to use a road engine to do the switching it would be more prudent and less dangerous to men working about the engine to attach a flat car to the pilot of the engine. I did observe the headlight on engine No 68 and it was in good

condition. The light from the headlight from engine No. 68 would fall on the car ten or fifteen feet ahead of the engine. As to whether the headlight would make the car clearly visible would depend upon the position of the party. If he was in front of the engine the headlight would blind him. If behind the engine it would not. Persons standing from 70 to 75 feet in front of the engine could distinguish objects in either direction for considerable distance. On the morning of March the 12th when I ran into the flat car attached to the engine, I could have seen the car by exercising due caution. It was carelessness on my part I do not know by what way Gentry got on the track. I found him on the north rail of the main line. I do consider that the road engine and flat car was the best arrangement that could have been made at that time for switching There is a public crossing where people are in the habit of crossing the track just east of the coalchute, where Gregg street crosses the T. & P. Railway. Gentry's body was found about 175 yards west of the crossing. The engine and flat car had been in use during the day of March 13th, 1890. It is one of the duties of locomotive engineers to go to the round house during the day time when off of the road to see about their engine. I do not know whether Gentry was at the round-house that day or not. I do know whether a man could see the flat car approaching ahead of the engine when he was going through under the coalchute. It is not necessary for Gentry to use a lantern while on duty. If a man were to stop and look he would see the car going by him. Road engine 68 was being used for switching purposes at the time Gentry was killed on account of the regular switch engine being in the round house for regairs.

IX.

Plaintiffs introduced in evidence the deposition of *A. B. Perkins*, who testified as follows:

My name is A. B. Perkins, age 45; place of residence Big Springs, Texas; business, locomotive engineer, have been for twenty years. I knew L. D. Gentry; he is dead. I don't know how he was killed except by hearsay. I am familiar with the yards of the Texas & Pacific Railway Company at Big Springs, and was on March the 13th, 1890. During that period a road

engine, No. 68, was being used in said yard for switching purposes. I do not know who ordered road engine No. 68 to be used for switching purposes at that time. I have had occasion to observe whether or not, on a dark night, said flat car in front of said engine would be easily seen by a person on or near the track in front of said engine. It was difficult to see such a car under such circumstances. The headlight of the engine would shine on top of the car and one could not see the sides or ends of the car, and the light shining on the top would make it look like a continuation of the road-bed, and one would not notice where the light came over the end of the car, as the headlight shining in one's face has a tendency to blind him. I did have an experience with said flat car in front of a road engine on a dark night a short time ago, not over four days before Gentry was killed. I was going to the shop from my house on my usual route at Big Springs, passing underneath the coal-chute along a path leading under the west part of the coalchute towards the round-house; the said engine 68 and a flat car were backing slowing to the east by said path; just as I got the the track, just as the engine
36 got past I started to go across t e track, and not seeing the car I walked right against it. It was with difficulty that I was kept from being thrown down. I was looking straight ahead in the direction of the car and over it, and did not see the car until I walked against it, because the headlight shown only on the top of the car and road-bed, and the top of the car and road b d looked all alike. A road engine with a car coupled in front is more dangerous to switchmen operating it, and to other employees whose duties require them to be about the yard at night, than a regular switch engine. A light on the end of a flat car used in front of an engine, as that car was, for switching purposes, would conduce to the safety of employees in the yard, whose duties required them to pass through the yard at night. The reason why is that the light would show where the front end of the car was. I do not know whether lights are generally so placed or not. It is a fact that one switch engine is abundantly sufficient to perform the work at Big Springs. I do not know of my own knowledge why road engine No. 68 was being used in the yards at Big Springs on March the 13th, 1890. The flat car must have been attached to lessen the danger to switchmen in making couplings. It is the custom

on all roads of which I have any knowledge to use a road engine for switching purposes when a switch engine becomes temporarily disabled and there is not another to take its place, until it can be repaired, and when a road engine is being used for switching purposes to attach a coal car or flat car to the front end thereof for the purpose of lessening the danger to those working with said engine while so used. I think L. D. Gentry knew of this custom, and the opportunity that he had for knowing it was that he had been a locomotive engineer for several years. There was a head light in good condition upon engine 68 the night Gentry was killed, which could have been seen three or four hundred yards in either direction, provided the light was towards the person looking. It is a fact that one standing in front of the engine upon the track could not have failed to see the headlight. The light was not on the car, but shown on the top of it from the headlight which was on the engine. I could see the headlight on the engine distinctly. The flat car was about 33 feet in length, and the rays from the
37 headlight would fall on the car about fifteen or twenty feet from the engine. It would not light up the sides or front of the car and make it clearly visible. If the headlight was shining in the direction where Gentry's body was found and one standing on the track possessing the ordinary power of seeing, could see it a quarter of a mile or more. It is usual and customary to couple cars to both ends of the switch engine in switching about and cars are coupled as often to one end as the other, and the switch engine about often pushes cars as it pulls them. It is the practice not to take the pilot off and place steps in its stead upon a road engine which is being used while the regular switch engine is temporarily disabled. This is only done when it is intended to use a road engine for switching for a long time.

X.

Plaintiffs introduced in evidence the deposition of *H. C. Reed*, who testified as follows:

My name is H. C. Reed, age 31, reside at Big Springs, Texas, am a clerk in the motive power department of the T. & P. Rwy. Co at Big Springs; have been in said business about fifteen years. I knew L. D. Gentry, he is dead. He died March 13th, 1890, at about 8:30 P. M. at Big Springs, Texas, near the coal-chutes at T. & P. shops. I saw him a few minutes before he was

brought home about 8:45 or 9:00 o'clock P. M. March the 13th, 1890. Is aw where he was crushed across the hips and left hand, and the next morning I saw the blood on the rails near the coal-chutes; also on the wheels of the car that was in front of engine No. 68, used in the yards at Big Springs on the night of March the 13th, 1890. I al o saw his lantern there which had been broken. I am familiar with the yards of the Texas & Pacific Railway Co. at Big Springs, but not with the work that was being done there. On the 13th day of March, 1890, road engine No. 68, with a flat car attached, was being used in said yards for switching purposes. I do not know who ordered said road engine to be used for switching purposes instead of the regular switch engine. The superintendent has charge of all engines after leaving the turn table. S F. Judy was superintendent of the Rio
38 Grand division of the T. & P. Ry. then. I do not know who ordered this flat car to be coupled in front of said road engine No. 68. I have had occasion to observe whether a flat car could be easily seen at night by one in front of an engine. Unless your attention is called to it, it is difficult to see it under such circumstances. The head-light shining over the end of the flat car and striking the floor of the car about three fourths of its length does not light up the side of car, and it does not make the light on the floor of the car plain, on account of the floor being a little lower than the eyes of a man of ordinary height, and being close the glare of the headlight has a tendency to partly blind one stepping in front from the dark. A light that could be seen from both sides of the track on the front end of the flat car would conduce to the safety of employees at night, but I do not think a headlight on the front end of a car would. A light that could be seen as above stated from both sides of the car would enable one to know that the car was there. I do not know whether such lights are generally placed on such flat cars when so used. One switch engine is all that is used in the yards at Big Springs, both day and night, and is sufficient.

Road engine No 68 was temporarily used for switching on account of the regular switch engine being temporarily disabled. The car was used for safety of the yard switchmen, as engine No. 68 had pilot on My experience in the railroad business is confined to the T. & P. Ry., and it is customary with said road to use a road engine with a car ahead when the regular switch en-

gine is disabled. L. D. Gentry had abundant opportunity of know ng that cus om and rule and it has always been the custom of the railway company to do this and it was used by them day and night. The headlight was on engine No. 68 at the time it was being used for switching purposes. Said head-light was in good condition, and one standing where the body of Gentry was found at coalchute could see the head-light from both directions three or four hundred yards. Anyone standing in front of the engine could have seen the head-light plainly for a distance of three hundred yards or more, and anyone standing in front and opening his eyes could not have failed to see the head-
39 light. The flat car was about 32 feet in length The light from the head-light would fall on the flat car about three-fourthsof the length of car. It would not light up the sides of the car and I do not think it would make it clearly visible. Anyone standing on the track where L. D. Gentry's body was found, and possessing the ordinary powers of seeing, could see the headlight one ngine No. 68 for a distance of three or four hundred yards in either direction on a dark night. A headlight was on engine No 68 the night Gentry was killed and was burning brightly. It is usual and customary, and in fact a daily occurrence, that where regular switch engines are being used for switching purposes, cars are coupled at times to both ends of said engine at the same time, and cars are coupled about as often to one end of the engine as to the other. A switch engine oftener push the cars in front of it than pull them while at work. It is customary not to take the pilot off the road engine when used as switch engines temporarily but to place a car in front for the safety of yard switchmen when coupling. It is not customary to take the pilot off of road engines and place steps in front unless the engine is to be used for switching a long time.

XI.

Plaintiffs introduced in evidence the deposition of *Frank Hays* who testified as follows :

I am 44 years old ; live in Big Springs, Texas. I am locomotive engineer. I knew L. D. Gentry. He dead, he died on March the 13th, 1890, in the yard of the T. & P. Rai way Company at Big Springs. I did observe the flat car coupled in front of engine 68 that was being used for switching purposes in the yards at Big Springs on the night of March the 13th 1890. I consider such

appliances unsafe. The road engine has a pilot and the regular switch engine has a step and headlight on each end. The road engine is most dangerous for switching purposes. A flat car in front of the engine could be distinguished by a person standing near the track 30 or 40 feet in front on engine on a dark night, if such person was not blinded by the headlight. I know of path way which leads under the coal chute to the track from the south, which has been used five years by employees and others. No light is kept on this pathway. There were no lightsor signals on the flat car the night Gentry was killed. I have known L.D. Gentry nine years. He was careful, skilled, sober and industrious. He was paid 3 1-2 cents per mile. His average earnings were about $155.00 per month. I have seen road engines and flat cars often used for switching. It is often the best arrangement that can be made. The use of the same is common and well known. Whenever it is necessary to use a road engine for switching purposes, it is less dangerous to couple a flat car on the pilot of the engine than to attempt to do switching without it. It would be very hazardous to switchmen to attempt to do switching without the flat car attached to the pilot of the engine. Flat cars are about 30 or 33 feet long, and a person 30 or 40 feet in front of an engine would be close to the car coupled in front of the engine. I am not willling to swear that a person standing 30 or 40 feet in front of an engine on a dark night could not see the car. The light from the head light of the engine would strike the ground about 15 feet from the engine, and would illuminate the ground from that point a long distance ahead and light up brilliantly the track as far as the light extended. I did not notice whether the light from the head-light of engine 68 struck the top of the flat car from ten to fifteen feet from the engine.

XII.

Plaintiffs introduced in evidence the deposition of *Mike Molett*, who testified as follows:

I am 35 years of age, and live at Big Springs. I was residing at Big Springs on the night of March the 13th, 1890, and was employed as locomotive engineer. I knew L. D. Gentry. He is dead; he died in Big Springs on March the 13th, 1890. I did not observe the flat car in front of engine 68 on that night. I consider flat car in front of engine unsafe for switching purposes. A

switch engine has foot steps in front and is not so dangerous to the public as a flat car with engine. A person standing near the track 30 or 40 feet in front of the engine could not distinguish the flat car in front of the engine on a dark night, on account of being blinded by the headlight.

41 The path under the coalchute has been used by employees about five years. There are no lights on said pathway. I had known L. D. Gentry five years. He was careful, skillful, sober and industrious, and was paid by the mile. His average earnings were about $150.00 per month. I did not go down into the yard. I did not know that engine 68 with a flat car attached was being used. I have often seen a flat car attached to the pilot of the engine to be used for switching purposes in the yards at Big Springs. I do not remember of seeing it done on other roads. I do not know that it is common to use flat car in front of engine for switching purposes. A road engine with a flat car attached to the pilot is much less dangerous to switchmen han a road engine without the car attached. A road engine with car attached is often the best and safest arrangement that can be made for switching purposes when the switch engine is out of repair. I do not know that it is so extremely dangerous to couple onto a pilot, as it is done every day on the road. I am a member of the Brotherhood of Locomotive Engineers. I am not biased in favor of the plaintiffs in this case and there is no understanding between the engineers at Big Springs with the view of aiding the plaintiffs.

XIII.

Plaintiffs introduced in evidence the deposition of *L. F. McKay*, who testified as follows:

I am 32 years of age and live at Big Springs, Texas; lived there on March the 13th, 1890, and was engaged in the business of locomotive engineer. I knew Louis D. Gentry. He is dead; he died at Big Springs on March the 13th, 1890. I have seen switching done with flat car in front of road engine. Do not remember the number of engine or the date. I do not consider this as safe as a regular switch engine. A regular switch engine has headlight and step on each end and a road engine has no step and has a pilot in front, which I consider most dangerous. My experience is that the flat car cannot be easily distinguished on a dark night by a person standing near the track

30 or 40 feet in front of the engine, on account of the head-light blinding the eyes. A path enters the yard at the west end of the coalchute from the south, and has been used by
42 employees and others. Has been so used for about two years by men going to and from the round-house. I have never seen lights on said pathway. I have known L. D. Gentry using said path. I have known L. D. Gentry for over six years. He was a sober, careful and industrious man. He was paid as locomotive engineer for his services by the mile. His average earnings were about $150.00 per month. I have seen flat cars in front of road engine switching in Big Springs yard on several occasions, but don't remember of seeing it at any other place. It is common when doing switching. It is a common thing when using a regular switch engine to have cars attached to both ends of the engine while doing switching, and I would not consider it necessary to have lights on the cars at both ends of the engine. We do not attach flat cars to engine to do switching on the road. My experience in yard work is very limited. A flat car is about 30 to 33 feet long and it would be very difficult for a man standing 40 feet in front of engine to see the flat car. With some head-lights it could be seen and with some it could not. It depends upon the position and construction of the head light.

XIV.

Plaintiffs introduced in evidence the deposition of *E. F. Hadlock*, who testified as follows:

I am 27 years old : nd reside at Big Springs, Texas. I lived at Big Springs on March the 13th 1890, and was locomotive engineer. I knew L. D. Gentry. He is dead. I understand he died at Big Springs from reliable witnesses, and I attended his funeral. I did not observe the engine and flat car on that night, but did before and after the night of March the 13th, 1890. I would not consider it as safe as a regular switch engine. A regular switch engine is provided with platform, steps and railing to hold to and lights on each end of the engine, while the flat car has none of the above appliances and is more dangerous. I do not think that said car would be seen by a person coming under the coalchute if the engine and car is 35 or 40 feet to one side of him, because the coalchute is supported from the ground by upright

posts and braces, which is so near the track that a person
43 would step out upon the track before he could tell what was going on, and when he looked up the head-light would naturally blind him and he would not see the flat car, and would think he had time to cross the track in front of the engine. I know of a pathway under the coalchute at Big Springs running from the track south into town. I have known of its being used for the last five years by persons who desired to use it. I have never seen any lights along the pathway. I have seen L. D. Gentry use this pathway going from his residence to the shops. I had known L. D. Gentry for seven years. He was careful, and skillful in his trade sober and industrious. He was paid as locomotive engineer by the mile. His average earnings were about $150.00 per month. I was in El Paso on the night of March the 13th, 1890, 342 miles from Big Springs. I have seen flat-car attached in front of an engine for switching purposes, though it is not a common occurrence. In case a road engine is to be used and they have not time to take the pilot off and attach a draw head to the pilot beam and put steps on the front on the engine, it would be safer for switchmen to attach a flat car in front of engine, as the pilot bar could be coupled onto a flat car drawhead and the head on the other end of flat car would make it safer for switchmen in making couplings than using the pilot bar without the flat car. Under certain circumstances the flat car could be seen, but under such circumstances as this of a person standing near the track 30 or 40 feet in front of the engine, he would not likely see or hear the flat car on account of the head-light blinding him, and the noise of the engine; the light and noise would attract his attention toward the engine. It is a fact under some circumstances that the light from the head-light of the engine will fall ten or fifteen feet in front of the engine and will fall on the flat car coupled in front of the engine ten or fifteen feet from the engine, and will light up the ground on both sides of the track for a long distance in front.

XV.

Plaintiffs introduced in evidence the deposition of *L. C. Lesure*, who testified as follows:

I reside at Baird, Callahan county Texas. Occupation
44 yardmaster T. & P. Ry. Co., yards at Baird, Texas. I know Louis D. Gentry. He is dead. I saw his dead body

a few minutes after he died; I suppose thirty or forty minutes. His body was lying across the north rail of the main track of the T. & P. Railway, opposite the coalchutes at Big Springs, Howard county, Texas. I cannot say as to the cause of his death. I made an examination of the tracks and pilot of the engine No. 68. I do not remember as to the date, it was the night L. D. Gentry died. I also examined the wheels of the flat car which which was coupled in front of the engines. Thomas A. Gentry, Walter A. Winters and myself being present. By close examination we found blood on the wheels of the car next to the engine and on the pilot of the engine. We also found some flesh and hair on the fourth slat of the pilot, which evidently came from human head. I cannot say as to the exact time when we found the body of L. D. Gentry, know it was thirty or forty minutes after he was killed. It was near the coalchutes, and was across the north rail of main line of the T. & P. track, badly mangled, as if it had been run over by the cars of an engine. I was present after the death of L. D. Gentry when engine No. 68 with a flat car attached was placed at or near the point of the track where gentry met his death, for the purpose of determining whether or not the flap coupled in front of said engine could be seen by a person standing near the track in front of said engine. I could see the flat car. I cannot say whether I would have seen it or not had I not known it was there and had not been looking for it. We passed under the coalchute as we supposed L. D. Gentry did and had the engine to come down the main line, as it was or did when L. D. Gentry was supposed to have been killed, and I could distinguish said flat car. I have been engaged in the railroad service about 13 years, as fireman, hostler, engineer, brakeman, switchman, conductor and yardmaster. A regular switch engine, having no pilot, has a headlight at both ends and foot boards at both ends and sides and a tank giving better chance of view for engineers is better adapted for switching purposes. There were no lights at the coalchute when L. D. Gentry was killed,

45 that I know of. The yard was lighted up as they usually are in yards of this size. On the night L. D. Gentry died, I suppose an hour after he was found, Thomas A. Gentry, Walter Winters and myself made an examination of the car and pilot of engine 68. We found Gentry's body on the north rail of the main line and near the 6th coalchute. I did not see any indications that Gentry had passed under the coalchute. I can-

not say whether or not it is a fact that the light from the head-light lighted up more than half the car, or whether the light was thrown on both sides of the track for a long distance in front of the engine, and I do not know whether it is a fact or not that you could readily distinguish the flat car from the light given by the head light, or whether or not a person standing 30 to 75 feet in front of the car could readily see t e flat car in front of the engine. To my knowledge, it is customary, when a regular switch engine is ouf of repair, to attach a flat car in front of a road engine and use it for switching purposes. It is the next best way that can be done for the purpose of carrying on the work of switching. I have had considerable experience in switching cars in the yard of the T. & P. Ry. Co., and it is common for the regular switch engine when being attached to a train for the purpose of switching the same, to have cars at either end of a switch engine. I think it would be safer to have a light on the farthest car from the engine, though this is seldom done. It is customary to have lights at depot platforms and public street crossings, though in small yards, like the one at Big Springs, this is not done, and switch light and head-lights and lanterns in the hands of switchmen are about the only ones to be expected. I cannot say whether or not the head light on the engine being used for switching was sufficient for the purpose, neither can I say that a lantern on the flat car was where the head light could have been seen.

XVI.

Plaintiffs introduced in evidence the deposition of *Thomas A. Gentry*, who testified as follows:

My age is 33 years. I reside at Baird, Callahan county, Texas. Am by trade a locomotive engineer. I knew Louis D. Gentry. He is dead. He died on the 13th of March, 1890, on the Texas & Pacific Railway Company tracks at Big Springs. He was killed by being run over by a flat car attached to and ahead of engine 68, which was being used for switch engine in Big Springs' T. & P. Co.'s yards. I made an examination of engine No. 68. I also examined the car and trucks and pilot of said engine on the night of March the 13th, 1890. It was about 1 o'clock A. M. that I made this examination, as near as I can state. W. F. Winters and L. C. Lesure were with me, and I think A. S. Ord, switch engineer of engine No. 68 was also present. I saw blood on the north wheel

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of the flat car and on the pilot of the engine. I also saw blood and particles of flesh on the north wheels of engine truck. I saw my brother's body, the said L. D. Gentry, in about two hours after he was killed. His face was scarred and scratched, otherwise I know nothing of the condition of his body except that I was told by those who knew, his neck was broken, and that the wheel of the flat car had passed over his ribs, and that his hips were badly crushed. I saw the body at his house I was present at the place where L. D Gentry lost his life when the examination of the car and engine was made, and saw the car and engino placed as near the place as we thought the point where he crossed and walked from south to north, as I have reason to believe he did, as was his custom, under the coalchute I do not think that an unsuspecting person would have seen the car, as the headlight shown over it and blinded the eyes. I did see the car because I knew it was there and was looking for it. The reason I saw that an unsuspecting person would not and could not see a flat car ahead of engine 68 on the night of March 13th, 1890, was because the rays of the head-light did not fall on the car or any part of it. The reflection from the head light was higher than the car. I have been engaged in the railroad service now about 17 years, as fireman, hostler and locomotive engineer; I have served in the latter capacity about 11 years. A switch engine regularly built and equipped for switching purposes is less dangerous than a road engine, as the pilot and flat car as are sometimes used, are not to be contended with, and they are unnecessary appendages. I know of a path-way passing
47 under the coalchute which is used by switch and yard men who live on the south side of the track. It has been used for seven or eight years. I do not know of any objection ever being made to its being used, as it was convenient for employees, and a shorter way to and from their work. I do not know of any lights except the red and green lights on the switches in the yard There were no lights along the above mentioned pathway on the night of March 13th, 1890. There were no lights or lanterns on the flat car ahead of engine No. 68 on the night of March 13th, 1890 L. D. Gentry was about 36 years of age at the time of his death. He lived in Big Springs, Howard county, Texas. L. D. Gentry was a railroad locomotive engineer and had been engaged as such for about twelve years. L. D. Gentry was paid by the mile for his services at 3 1-2 cents per

mi e. His average earnings per month were about $150 00 or a little more. He was married. His wife is about 26 years old and lives at Big Springs. Her name is May Gentry. He left two children surviving him, a girl named Olive Lee Gentry, about six years of age, and a boy, Thomas Marion Gentry, aged two years. His father was dead. His mother, whose name is Mary A.Gentry is still living and is about 75 years old, and lives at 222 East 7th street, Sedalia, Missouri. L. D. Gentry had always contributed to his mother's support from the time he was old enough to work. I cannot say how much per month he had been sending her prior to his death. He once agreed with me that he and I should each send $25 per month. L. D. Gentry arrived at Big Spring at 5:52 A. M. on the morning of March the 12th, 1890, and was to leave with his engine and train at 9:25 P. M. on the same day. He was off from 5:52 A. M. until he signed the call book at 9:15 P. M. on March the 13th, 1890. Louis D. Gentry was my own brother of the full blood. When I first heard of my brothers death I was in Frank Leter's restaurant in Big Springs, Texas. I saw my brother's body in about two hours after he was killed. I made the examination of the engine and car and the wheels of the engine and car about one o'clock A. M. on the 14th of March, 1890. I cannot say who it was that first suggested that we should make an examination, but think it was W. F. Winters.

48 The rays of the head-light did not fall on the middle or front end of the said flat car or any part of it. I have seen flat cars used ahead of road engines for switching purposes, but I say that a flat car used ahead of an engine is an unnecessary appendage, as is also a pilot on engines used for switching purposes. I am satisfied that L. D. Gentry did not know that the flat car was being used ahead of engine No. 68 on the night of March the 13th, 1890. I don't know what, if any, opportunity he had to observe that the flat car was being used ahead of engine No. 68 on the 13th of March, 1890.

To the testimony of said witness, as follows:

"He (L. D. Gentry) was killed by being run over by a flat car attached to and ahead of engine No 68, which was being used for a switch engine in Big Springs T. & P. Ry. yads."

When the same was offered the defendent then and there objected, on the ground that the witness was not present when L. D. Gentry was killed, and did not see or know how he met his

death, as shown by the witness' evidence, hence the statement objected to was a mere guess and inadmissible.

XVII.

Plaintiffs introduced in evidence the deposition of *Walter Winters*, who testified as follows:

My name is Walter Winters. Am 32 years old. I live at Weatherford, Texas. I am a locomotive engineer and was a locomotive engineer on March the 13th 1890, and have been engaged in that business about eight years and five months. I was in Big Springs, Texas on the evening of the night of March the 13th 1890. I was acquainted with Louis D. Gentry. I saw Louis D. Gentry at Big Springs in the night of March the 13th 1890 He is now dead. He died at Big Springs, Texas, and it is said he was run over by a car. They had a car there ahead of an engine which was being used for a switch eng ne. There was no light on the car only the reflection from the head light, and there was only a part of the car that was in the light. It was a flat car. I was at the place where Gentry's body was found shortly after he was killed. I guess a couple of hours. Tom Gentry was
49 with me. I saw switch engine No. 68 with a flat car coupled in front of it, which was switching in the yards of the T. & P. Ry Co. at Big Springs on the night of March the 13th 1890, an hour and a half or two hours after finding Gentry's body. I examined the trucks of said flat car and of said engine, and examined the pilot of said engine, with a view of seeing whether this car or engine had passed over a human body, and I found blood on the brake-beam of the car, and found hair and blood on the pilot of the engine. This examination was made about two hours after finding Gentry's body, to the best of my recollection. I was present when engine 68 and flat car was switching near the spot where Gentry's body was found. I did not stand near said engine and car with a view of ascertaining the practicability of seeing said car at night. If a person was standing in front of said engine, the flat car could be seen with difficulty. I was standing by the side of the track when the engine and cars passed me about five or six feet from me. Of course I knew the car was there, and it was very little difficulty for me to see it, but a person not knowing it was there might not have seen it so easily. If a man knew the car was there he could very

easily see it by the head light, and the engine being so much higher than the car reflected the light over it. A person not knowing the car was there might not have seen it. Standing by the side of the track, the head light of the engine would have no effect upon the vision of the person, I do not think, but standing in the middle of the track and looking at said head-light it might have had a dazzling effect upon the vision. When I saw said flat car it had no lanterns, lights or danger signals on it except the head light. I observed the reflection of the head-light from engine No. 68 on the night of March the 13th 1390. Most of the reflected rays of light from said head light passed over and beyond the car. About one-half of the car was illuminated by such reflected light from the head-light. The end of the car was much more illuminated than back towards the middle, as the light got dimmer towards the middle of the car and towards the engine. Railroads use red lights for danger signals. There are differently constructed head-lights. In some head-lights the glass in front of the reflector is inclined so as to reflect the rays of light at a point on the ground in front of the engine. Some of the head-lights set straight up in front of the engine, that is the glass in front of the reflector sets straight up and that is what throws the light some distance ahead of the engine before it illuminates the ground, and a man on the pilot would be somewhat in the dark. The kind of head-light that was on engine 68 on the night of March 13th, 1890, was of this latter description, that is, one with the glass straight up. Engine No. 68 was an ordinary road engine and not a switch engine. The only difference between a switch engine and a regular road engine is that the road engine has a pilot in front of it and a switch engine has a step in front of it for the convenience of switchmen. The engine with a pilot is more dangerous than an engine without a pilot for switching. Said road engine could have been changed so as to make it less dangerous, and could have been made so as to avoid the necessity of using a flat car ahead of it, by taking off the pilot. Regular switch engines have been in common use on railroads about ten years, and were in use at the time of this accident in March, 1890, on the different railroads in Texas. All of the railroads in Texas use switch engines where they have a yard that they do switching in or make up trains in. Big Springs is an important point on the T. & P. road and is the head of a division. They have a

yard there and do switching and change crews. Big Springs is the headquarters of the Rio Grande division. The railroad has a repair shop there and it is headquarters for the employees. I do not know how many employees make it their headquarters. I suppose it was the duty of the master mechanic, Mr. Douglas, to have made this engine less dangerous by removing the pilot and putting on steps, but it was the yardmaster's duty to see that there was a light on the car. A red lantern, or any other color, can be seen and distinguished by the human eye, when placed within the radious of light reflected from the headlight of a locomotive. I had known L. D. Gentry eight years prior to his death. I knew his reputation among those who knew him best for industry, sobriety and skillfullness as a locomotive engineer and his reputation in above respects was good.

51 The regular switch engine was in the shops for repairs on the night of March the 13th, 1890. I do not know positively, but I understand the switch engine was out of repair and that it was temporarily in the shops for repairs, and that the road engine was being used until the switch engine could be repaired. It was not practicable to obtain another switch engine to do the switching that was necessary to be done there after the regular switch engine became disabled. I do not know how far it was from Big Springs to the place from which another engine might have been gotten. I do not know whether one could have been obtained at Ft. Worth or not. One switch engine was ample under ordinary circumstances to do the switching in the yards at Big Springs. It is almost a daily occurrence, at least quite common, to use road engines for switching purposes if the switch engine become disabled or incapable of doing the necessary switching. They use, for the time being, an ordinary road engine for switching purposes. Where they use a road engine for switching purposes, they usually use a flat car in front of the engine, or a coal car, coupled to the pilot, and it is a fact that such car in front of the pilot lessens the danger to switchmen in making couplings. I do not know whether L. D. Gentry had many opportunities of observing this manner of switching or not. It is customary for this section not to have any other lights in the yard other than the ordinary switching lights in doing switching. The only lights necessary in doing switching are the lamps ordinarily carried by switchmen in giving signals, etc., while switching. It is a fact that in switching

cars are about as often coupled at one of the engine as the other, and it is customary at Big Springs. I cannot say that it is frequently the case that cars are coupled on both ends of the engine at the same time. It was about an hour and a half after finding Gentry's body before I examined the trucks of the car and the pilot of the engine. Tom Gentry was with me the first time I examined said trucks and pilot, and the second time I examined them Lee Lesure and Tom Gentry were with me. I do not know how the engine and car came to be there, or that any one suggested that they should be placed there for the purpose of making an observation. They were just moving along when I first saw them. I was
52 standing at the south side of the railroad track and did not get on the track in front of the car, I could see the head light of the engine. An ordinary flat car is about five feet high, and that car was about an average in height. It was about that high from the ground between the rails to the top of the car. Gentry was about five feet nine or ten inches high when standing erect. Any man with an ordinary sight would be compelled to see the head light of an engine if he got upon the track from 25 to 30 feet in front of the engine and turned his face towards it and opened his eyes. There was a head-light on engine No 68 on the night of March the 13th, 1890. So far as I know the head-light was in good condition except that the reflector was quite dirty. It seemed to be burning all right, and the lamps seemed to be burning all right. It was the engineer's duty to see that the car and engine were properly lighted and burning while the engine was at work. The reflector of engine No. 68 would make the light fall upon the ground about 15 feet ahead of the engine. The car was illuminated for about half of its length, but the light was shining dimly on the part of the car towards the center. The end of the car farthest from the engine was in a brighter light and clearly visible. The light decreased in brilliancy so gradually as it went back towards the engine that it would be hard for me to tell just how many feet of the car was clearly visible. A person standing in the place where Gentry's body was found could see the head-light of the engine looking in the direction from whence the engine came a half mile or more. The rays from the head-light would make the top of the car lighter than on the sides of t e car or in front of it. The rays would fall somewhat on the ground on each side

of the car. This would make all of the car clearly visible that the light would shine on. It is not usual and customary to take the pilot off the road engine when it is to be used for switching purposes only a short time. I cannot say as to how many engines I have seen used for switching with the pilot on, or how many with the pilot off.

XVIII.

Plaintiffs introduced in evidence so much of the deposi-
53 tion of *A. S. Douglas* as follows:

At the time of Gentry's death I was master mechanic of the T. & P. Ry. Co. in the yards at Big Springs, since then I have been promoted to superintendent of motive power, with headquarters at Marshall now. There were no rules and regulations adopted and enforced in the yards at Big Springs in March 1890, requiring any lights to be placed on flat cars in front of the road engine moving through the yard in order to give warning to employees and others in regard to where the car was moving and when it was moving.

XIX.

The plaintiffs introduced in evidence the deposition of *A. F. Brown*, who testified as follows:

I am engaged in the life insuranc business, I am familiar with the tables of expectation of life as adopted by the leading life insurance companies of the United States. I have the tables with me- The expecation of the life ol a person in sound health at thirty-five years of age, according to the American table is 31.78 years, according to the combined experience mortality table which is an English table, it is 30.87 years. The difference in these two tables and the reason they became to be different is that one of them were taken in England in 1838; the American table was constructed from 1859 and 1871. It is true that one of these tables is based on the lives of a certain number of persons in England and the other in the United States. As to how much money it would take at present to purchase an annuity of $1800.-00 for tho life of a person 35 years of age would be owing to the rate of interest, the value of human life is based upon the expectation of life, the amount that a person is earning per annum and the rate of interest. There is only one company that sells annuities to persons of that age, the rest sell to persons of greater age than that, hat is, as young as 35. That company is the mutual of New York.

I have a table in this handy book which is an authority for placing a value on a human life, which may be what you want. An annuity is just the reverse of life insurance. An annuity is the means by which you can purchase an income of so much per year by paying a certain larger sum down. As to how much money it will take to purchase an income of $1800 for 31.78 years, $16.41 invested now will purchase an income of $1.00 per for 31.78 years. We mean by this if you take $16.41 and place it in a saving bank that savings bank could improve that much money at 4 1-2 per cent. and every year pay one dollar during the expectancy of life at the age of 35 years. If you take the $16 41 and improve it at 4 1-2 per cent per annum and pay $1 per year for 31.78 years, at the end of that time the income and principal would all be gone. To get it for any certain number of dollars multiply the $16 41 by the amount of the desired income and you get the value of his life. I only find one company selling annuities to as young persons as 35. The others all sell to older ages. The cost of an annuity in that company for that age is $16.04, which varies a small amount from this other, which is $16.41. There are no companies selling annuities which are asking a higher rate of interest for them than 4 1-2. I don't think they could do it. The rate of interest is gradually decreasing in the United States, and a contract extending over several years it would be dangerous to estimate a higher rate of interest than that. For 32 years at six per cent interest, which is the legal rate in this State now, it would cost $14.084; that is the nearest number of years I can find to that rate of interest. The greater the rate of interest the less the amount of money required. These tables, of course are based on insurable lives. In counting a man's expectancy of life we of course take an insurable life. As to what lives we exclude in our insurance basis we take into account a man's personal and family history. Different occupations have some effect upon it wi h some companies, and with some it does not. Some have a provision to scale the amount in case the man should be killed who is following some dangerous occupation. We would charge a railroad man the same as anybody else. I cannot say t is a fact that if we write insurance on the life of a man engaged in blasting that we make a calculation based on the fact that he may die sooner than if engaged in other occupations. I do not deal in annuity insurance. I only have authorities show-

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ing what annuities are worth. From practical experience
55 I do not know anything about the working of annuities.
My testimony is based on these books. In making the calculation as to the va ue of the life of a man working on a farm and that of an enginner on the railroad, in my business I would figure the chances of both living the same length of time, because there would be a provision in my policy to scale the amount in case the engineer should be killed Some of the other companies would charge a little more. I do not know whether they would figure that an engineer would live as long as a farmer. I am not posted on the annuity business. If I were to go to an insurance company for an annuity I think they would sell it for a certain number of years regardless of when the purchaser died. I think they will sell annuity for so many years for so much money paid down. I never was engaged in selling annuities. So far as our knowledge of insurance is concerned we get it all from books. I do not know whether or not, in making up those tables the question of the character of employment the man was engaged in would cut any figure as to how long he was likely to live. There is nothing said as to the different occupations. I think an insurance company would sell an annuity to a man engaged in blasting or railroading just as quick as they would to a man in an office here in Dallas. If a man buys an annuity the quicker he dies the better for the company. These books are considered the standard books on this subject by every insurance man in the country. This one is Taber's Three System and the other is called the "Handy Guide," gotten up by the Spectator Company. Mrs. May Gentry being 25 years old at the time of her husband's death, to mortality tables show that her expectation of life would be as great as that of her husband, L. D. Gentry. The expectation of life of a female of 75 years of age, according to the American tables, is 6.27 years. Six dollars and eighteen cents would purchase an annuity of one dollar per annum for 6.27 years.

Plaintiffs then closed and thereupon the defendant offered in evidence the deposition of:

I.

A. S. Douglas, who testified as follows:

56 My name is A. S. Douglas. On March the 13th 1890 I was Master Mechanic of the Rio Grande division of the Texas

Pacific Railway Company at Big Springs, Texas. I was employed by the T. & P. Railway Company. I was acquainted with L. D. Gentry. I recollect seeing Mr. Gentry on the day prior to his death. I think it was about 3:30 or 4 o'clock in the afternoon. I believe the occasion of my having seen him about that time was about having repaired some parts of his engine. Mr. Gentry and I first talked together at the round house, and afterwards stepped out to the turn table in the yard, while we stood there this switch engine No. 68 with a flat car in front of it was swi ching train 13, and passed the coalchutes where he was killed. I don't know whether he noticed the flat car in front of the engine or not, but we were standing there and stood there for fifteen minutes. There was nothing whatever that prevented him from seeing it. I think Mr. Gentry had been in the employment of the Texas & Pacific Railway Company at Big Springs from the year 1881. Mr. Gentry ran as freight engineer at first, I think. He afterwards became a passenger engineer and was one of the oldest men we had. He knew what the custom was of the company in regard to using road engines in the place of a regular switch engine when the switch engine got out of repair. He was one of our most competent men in that respect. It is customary when the regulars witch engine becomes disabled to use a road engine with flat car in front. It has always been that way on the T. & P. Railway. The regular switch engine was disabled at the time this road engine and flat car was being used. She was in the shop three days. I don't think the flat car was used the first day. I think it was put on the morning of the second day. The flat car has the same appliances for coupling as the box car has. The headlight of the road engine with flat car in front that killed Mr. Gentry would light up about five-eights of the car of the end furthest from the engine. The lighting capacity of the headlight on road engine 68 that night was about 80 candle power. That would reflect in front of the engine two and a half telegraph poles. The telegraph
57 poles are 250 feet apart from center to center. That headlight would not confine the light to a certain point but it would radiate on the side. It would radiate about 30 feet from the center of the track on each side. The focus of the rays of that head-light is triangular and radiates from the sides. The weight of that coupling bar on the front of a road engine is about 65 to 90 pounds. In making couplings switchmen have

to take hold of that in order to lift it. Switchmen and parties who work around the yard at Big Springs are furnished with lanterns. The engineers are not. The company had a rule (No. 16 general rules of the time card) in regard to ringing the bell while the switching was going on. It was the duty of the firemen to ring the bell. The object of this was to alarm anybody crossing the track of the motion of the engine. There is no difference in the head-light on a road engine and the head-light on switch engine. I know where the coalchute in the yard at Big Springs is. The distance from where you come out of the coalchute to the main track is thirteen or fifteen feet, that is the south rail of the main track. A person coming from under the coalchute could discover the head-light of an engine from either way. The coalchute is built upon piling and there are no solid boards cutting off the view. The rays from the head-light of a passing engine would be reflected under the coalchute. I was employed at Big Springs yard. I am familiar with the coalchute and the use of that engine No. 68. In my opinion, from my knowedge of the custom of using a road engine with a flat car in front, I would say that there is not a more dangerous appliance than the regular switch engine that it is customary to use in a yard. It is safer and more conducive to the protection of the parties who do the switching and work there in the yards, where a road engine is being used to attach a flat car in front. On the 13th of March, 1890, I was master mechanic of the Railroad Company in the yards at Big Springs. I have been promoted to superintendent of motive power with headquarters at Marshall now. There was no rules and regulations adopted and enforced in the yards at Big Springs in March 1890, requiring any lights to be placed on flat cars in front of road engines moving through the yards, in order to give
58 warning to employees and others in regard to where it was moving and when it was moving. To the best of my recollection that flat car was not put on until the second day. I could not say whether L. D. Gentry was in Toyah when that very flat car was put on. L. D. Gentry was on his run between Big Springs and Toyah alternately every other day. If the flat car was put on in the night of the 12th Gentry was not there. I don't know whether the flat car was put on that day or that night. I know Walter Winters. He is dead. It is not necessary to put lights on the front end of a flat car like that in doing switching

The head light was sufficient to do the work by.

II.

Defendant introduced in evidence the deposition of *F. W. Maxwell* who testified as follows:

I am Division Superintendent for Texas of the Missouri, Kansas & Texas Ralway Company. Have been engaged in the railroad business for 25 years, as messenger, operator, clerk, train dispatcher, trainmaster and superintendent. It is usual and customary when a switch engine becomes disabled and incapable of doing switching to use an ordinary road engine temporarily for switching purposes until the disability of the switch engine can be removed, or another supplied. In my opinion it is proper to do so. It is customary in such cases to couple a coal or flat car in front of the road engine for the reason it is safer for switchmen in making couplings than it is to use pilot bar without flat car in front of engine. I think it proper to couple a flat car in front of an engine. To couple a flat car in front of road engine when being used for switching purposes lessens the danger to switchmen working therewith. It is customary to take the pilot off of road engine in cases where it is expected to use the road engine in the yard for switching purposes for several weeks or more. I do not consider it necessary to take the pilot off of road engine when it is intended to use such engine for switching purposes for a few days. In such cases it is customary to couple flat car in front of road engine instead of taking pilot off. It is usual and customary for railroad com-

59 panies to employ a sufficient number of engines in yards to do the necessary switching, but it is not customary to have additional switch engines to take the place of regulars witch engines that may become disabled. It is customary in case regular switch engines become disabled to use road engines instead while the switch engines are being repaired. It is true that most first-class railroads have regular switch engines, manufactured for the special purpose of switching. It is also true that a great many of these roads use a great number of engines of the class known as road engines for switching purposes than of the regular switch engines. The only alteration being to take off the pilot and place steps on front end of engine and rear end of tender in cases where such engines are to be used for a con

siderable length of time for switching purposes. I know from my own observation that it is usual and customary to couple a flat car in front of a road engine while using it for switching purposes in place of regular switch engine on the Missouri, Pacific Railroad at Jefferson City, when that point was the end of two divisions, the Missouri, Kansas & Texas Railway at Parsons, Muskogee and at Denison, the St. Louis Iron Mountain at St. Louis. A road engine attached to a flat car for switching purposes is less convenient than a regular switch engine, but I do not consider it more dangerous to employees working with such engine or to other employees about the yard. I do not think that a flat car coupled in front of a road engine on a dark night is extremely dangerous or negligent towards employees in the yard not working with such engine and flat car, when there is no headlight or lantern on the end of flat car furthest from the engine, if the engine headlight is burning. I do not think it is extremely dangerous or negligent towards those employees in the yard who are not working with such road engine and flat car to use such engine and flat car on a dark night for switching purposes without having a lantern or light of some kind on the end of the flat car furthest from the engine. The head-light of the engine shows the position of the flat car. The road engine can be made as safe as far as concerns all employees about the yard who are not working with it, as a regular switch engine, by
60 having the pilot taken off and steps put on the front end and on the rear end of the tender. It is not customary to take the pilot off a road engine when same is to be used for no longer time than 36 hours at the time, in such cases it is customary to use flat car coupled to front end of a road engine. To my knowledge, it is not usual and customary for railways to place a head-light or other light on the end of a flat car coupled in front of a road engine when being used as switch engine. I do not think it is usual and customary to place a watchman on the front end of such car. I have never seen that done. Switchmen working with the engine and flat car frequently ride on the flat car with their lanterns when passing from one part of the yard to another. Engineers of passenger trains, while on duty are under control of the yardmaster. The yardmaster and his subordinates and conductors and engineers of passenger trains are all under the control of the trainmaster or division superintendent. Passenger conductors and engineers are under the control

of yardmasters while their trains are passing through yard limits.

III.

Defendant introduced in evidence the deposition of *W. E. Linnell* who testified as follows:

My present occupation is yardmaster of the G. C. & S. F. Railway at Cleburne, Texas. I have been engaged with railways for a period of between nine and ten years. I have been employed or worked as brakeman, conductor, switchman and yardmaster. It is customary and usual to use a road engine and flat car for switching purposes, the reason therefor is, that it provides better protection for the switchmen. Attaching a flat car lessens greatly the danger to the switchmen working therewith. It is not customary to take the pilot off the engine when a road engine is put in the yard temporarily to do switching, but if it is put there to do switching for a long time they generally take the pilot off. It depends upon the length of time the road engine will be used as a switch engine. It is customary for railroads to have two switch engines in their important yards. In the most important yards it requires two or more to do the work, but I have
61 never known where they have kept an extra switch engine in the yard to take the place of one that should become disabled, but at such time they generally use a road engine temporarily. It is true that switch engines have been made specially for switching purposes and are used in first-class railroad yards. I have seen a flat car or coal car attached to a road engine switching in the Texas & Pacific yards at Ft. Worth, M. K. & T. railway at Alvarado, the G. C. & S. railway at Cleburne and numerous other points. The flat car and road engine is not as convenient to do the work as a regular switch engine and not as much work can be done with them as a regular switch engine, but I do not consider that they are any more dangerous than the switch engine. I think there is less danger on a very dark night to the switchmen than a moonlight night, as there are no shadows on a dark night and there are on moonlight nights. It does not increase the danger to other employees of the yard if they know when the road engine is being used for a switch engine and it is their duty to be on the lookout at all times while on duty on a dark night or any other kind of a night. A flat car coupled in front of a road engine on a dark night is not very

dangerous when used for switching purposes as far as concerns the railroad employees whose duties compel them to be in and about the yards if there is a headlight on the engine and it is burning. The darker the night the light shows plainer. A road engine when used as a switch engine is always supplied with a head-light and it is generally known to all employees who work in and about the yard what kind of engines are used for switching purposes whether they work with such engines or not. It is true that it would be dangerous to run an engine with flat car attached if there were no lights at all, but all engines are supplied with lights and the switchmen are supplied with lanterns. A light being on the flat car would be very dangerous for the switchmen, for it would be on a level with the switchmen and they could not see as well as if the light was higher, and for this reason the light is only placed on the engine. If the lights are on the engine it does not increase the danger of any of the employees of the road from being run over. I do not think there would be less
62 danger to employees of the road to have a light on the flat car, for I have tried the light on the flat car and I thought it rather increased the danger than lessened it. I think there is less danger on a dark night than there is on a moon light night. I think a head-light on an engine is better than a light on the flat car, for the reasons already stated. A road engine can be made safe to the employees in the yard in two ways: 1st: by putting a coal or flat car in front of it, and 2nd, by taking the pilot off and attaching steps. It is customary to attach a coal or flat car to a road engine if it is to be used for switching in the yard for 36 hours or more, but is not necessary or customary to remove the pilot for such length of time. I do not know that there is a general rule of any railroad to have a light on said flat car, further than one of the switchmen generally ride on the fron end of the flat car and he has a lantern. It is not customary to place a signal man on the front end of the flat car. The positions of the men and the signals are the same whether for road engine and flat car or for regular switch engine. One of the switchmen usually ride on the end of the flat car when they are passing from one part of the yard to the other, just as if he was on he steps of the switch engine. In one sense of the word locomotive engineers of regular passenger trains have no connection whatever with the railroad employees engaged in and about the yards, such as the yardmaster, switch-

men, engineers of switch engines. Locomotive engineers, when engaged at the end of their run in taking care of their engines are under the master mechanic, but when they are ordered for service out on the road and going to the yard, they are under the orders of the trainmaster or superintendent, same as conductors or yardmasters. It is true that the work in the yard is under the control of one officer representing the company and he is called the yardmaster. The running of passenger trains is under the control of another officer representing the company and he is called a trainmaster or superintendent.

IV.

Defendant offered in evidence the deposition of *T. G. Golden* who testified as follows:

63 My occupation now is that of General Superintendent of the I. & G. N. Railway Company. I have been in the railroad business for 25 years; messenger boy, telegraph operator, brakeman, conductor, train dispatcher, division superintendent etc. It is usual and customary when a switch engine becomes disabled or incapable of doing the switching to use an ordinary road engine temporarily for switching purposes, until the disability of the switch engine can be removed or another supplied, and it is proper to do so. It is also customary to put a flat car or coal car in front of a road engine while in use as a switch engine, for the reason that it is considered safer for yard men, and I think it proper to do so, and the use of a flat car in front of a road engine does lessen the danger to switchmen and yard men. When a road engine is being used temporarily for switching purposes it is not customary to take the pilot off. One or more switch engines are usually kept in yards for switching purposes, the practice depending upon the amount of work done in the yard. I do not think it common in this State to keep extra switch engines in reserve for possible accidents to the switch engines I know it to be the custom to couple a flat car in front of a road engine while using it for switching purposes, on the following roads: L. S. & M. S. Ry., at Erie, Pa., and Cleveland, Ohio; P. C. & St. L. Ry., Columns, Ohio, and Indianapolis, Ind.; Mo. Pac. Ry. and M. K. & T. Ry. and I. and G. N. Ry. at Sedalia, Mo., Parsons, Kansas, Denison, Palestine, Taylor, San Antonio and Houston, Texas. I do not think that a flat car when coupled in front of an engine when used for switching pur-

poses would increase the danger to employees working about the yards, as the head-light on front of engine when used for switching purposes would show the car ahead of engine to persons passing through the yard.

V.

Defendant introduced in evidence the deposition of *F. W. Rowhan*, who testified as follows:

I am general yardmaster of the Houston & Texas Central Railway Company at Houston, Texas. I have been employed some seventeen years in railway service in the capacities of fireman, engineer, track layer, brake-
64 man, conductor, switchman and yardmaster. It is the usual custom when a switch engine becomes disabled or incapable of doing the switching, to use a road engine to do the switching until the disability of the switch engine can be removed, and it is both proper and necessary that this should be done, and it is both proper and nece sary that this should be done, and it is both customary and usual, when a road engine is being used as a switch engine to couple a coal or flat car to the front end of such engine. The reason for doing this is to prevent danger to switchmen or brakemen in handling the shacklebar attached to the pilot of the engine in making a coupling, and also to prevent an accident to the brakebeams of cars or pilot of engine provided the switchmen miss the coupling, which, with shacklebars is frequently done. A coal or flat car in front of said engine would obviate this difficulty and avoid the handling of shacklebar ahead of engine. It is not usual or customary to take he pilot off of road engine when it is being used for switch ing purposes temporarily, that is, for two or three days or even a week, but if it was to be used in yards for two or three weeks, then the pilot customarily would be taken off, otherwise, such road engine with a flat car attached to the front end for switching. There are many first class roads that use all kinds and different kinds of switching engines. I have seen road engines with flat cars attached used for switching purposes, used on the So. Pac. Ry. at Houston, Texas, and at Beaumont, Texas, also in the International & Great Northern Ry. yards, the Texas Transportation Ry. yards at Houston, Houston, East & West Texas yards at Houston, and at other points in Texas, and at numerous other points in the north and east. I do not consider that a road

engine with a car in front would be more dangerous than a regular switch engine, for it is not infrequent for a regular switch engine to move through and switch in the yards with a flat or coal car ahead of the engine an hour or two at a time. From my experience there would be no more danger to other employes by having a flat car moved through the yards ahead of the engine than ahead of a regular switch engine. I do not think a flat car in front of a road engine increases the danger to employees that have to pass through the yards at night. I do not think a flat car attached to a road engine switching in the yard at night would be a very dangerous contrivance, as I have no difficulty in distinguishing such cars ahead of road engines at night. For many years I have received no complaints from employees working around such road engines and flat cars ahead, or from other employes working in and about the yards, that such road engine with flat car ahead was dangerous and could not readily be seen by such employees on any night. It is not necessary to have lights on the flat car, for the reason that the head-light of the engine shows two thirds of the flat car, and an ordinary light placed on the end of a flat car would not be distinguished any distance ahead of the head-light, which light being very powerful, would entirely absorb the ordinary light on the flat car. I do not think it more dangerous for employees of a railway company to be hurt by rail way engines with a flat car ahead than by regular switch engines. Employees in and about the yard must always be on the look-out for cars moving ahead or behind engines. I do not think it would conduce to the safety of employees to have a light on the flat car while switching in the yard. I think the head-light of the engine is sufficient in such cases. It is not usual or customary to place a head light or other light at the end of a flat car where there is an engine equipped with a head-light. I have never seen such thing done anywhere.

Defendant then closing, plaintiffs thereupon offered in evidence the following testimony:

F. G. Gooch, who testified as follows:

I reside at Dallas, Texas. I am engaged in practicing law. I am 48 years of age. I was engaged in the railroad service for 13 years, from 1874 to 1887. In 1874 I was running on the I. & G. N. R'y as brakeman and conductor and so continued up to about three years. After that I was claim agent for two years,

and from 1878 to 1887 I was assistant attorney for the railroad company. As assistant attorney I had charge of the accident and injury department I would investigate all accidents that occurred on the road. Baker, Botts & Baker were the general attorneys of the road. From 1874 to 1880 I was on the I. & G. N., from 1880 to 1887 I had charge of the T.
66 & P., M. K. & T., I. & G. N. and H. & T. C. I had entire control of the accident and injury department of these roads, Every accident that occurred I went on the ground or sent some one to investigate. Whenever there was anybody hurt I was to see whether the road was liable or not and see who was to blame. Even if a man got his finger mashed I was to see about it, no matter where it occurred. After the road was consolidated under Mr. Hoxie, I was promoted on with him and I had general charge of the accident and injury department on said roads. While with the railroads I saw road engines being used for switching purposes. The road engine has a cow-catcher in front of it and a long draw-bar, very heavy, the cow-catcher comes to a point and it is very difficult for a man to stand on it in coupling cars, it is dangerous to do so, so the draw-bar would be put into a flat car, attaching the flat car onto the front of the engine. The flat car would then take the place of the buffer on the switch engine I have seen a road engine and flat car used that way at night. According to my observation at first a light or signal was not used on the end of the flat car, but later this was done. The object of the light was so you could see the end of the flat car, at first such lights were not used and I complained to Mr. Hoxie about it, because I liked to have got killed myself about it one night. Mr. Hoxie was then general manager of the I. & G. N. Railway. I have seen a light or lantern used on the end of a flat car on all four of said roads. I don't think a switch engine ever moves without a switchman on it, unless he has moved unless he has moved to set a switch. When he is not setting a switch his place is on the front end of the engine. I consider a road engine with a flat car without a lantern on the far end of the flat car a dangerous appliance in a railroad yard to other employees who are passing through the yards and working in it. I was a law partner of Mr. Evans (plaintiffs' attorney , but we dissolved partnership a little while before this suit was instituted. I never talked to Mr. Evans about the facts in the case. He got a letter from a friend out west in reference

to this case and went out there. We expected then to go into the case together, as we were partners, but when he got back we dissolved partnership and we divided out our
67 cases and he took this one. Nearly all railroad men had the same experience and observation that I had, and a great many of them a great deal more. When using a road engine and a flat car for switching the head-light would only be on the engine, but the lantern would be placed on the far end of the flat car. When there is no lantern on the far end of the flat car it depends on what position you occupy as to whether the head-light will light up the flat car in front of it or not. The head-light throws the light beyond the car, it would not touch the car. Whenever a suit was brought I furnished the evidence to the law department. It is true that it would be very dangerous to use a road engine for switching purposes without attaching a flat car to it, as coupling would have to be done with a heavy rod on the front of the engine, which is long enough to reach beyond the cow-catcher. A man could not lift this bar with one hand hardly. To lift it up when the engine is moving would be very difficult and dangerous to the flat car would be attached for switching purposes. I gave Mr. Evans, plaintiffs' attorney, the names of Capt. Harris, Mr. Gordon and Major Wathen, as persons I thought would be able to testify as experts in this case. They are all experienced railroad men. Capt. Harris lives in Dallas, Major Wathen lives in Dallas and Mr. Gordon lives in Palestine.

Plaintiff and defendant then closed, and the foregoing was all the testimony introduced by the defendant and plaintiffs upon the trial of this case.

And thereupon the defendant requested the court to give to the jury the following special instructions:

1. You are instructed that it is the duty of an employee on any other party, about to cross a railroad track, to look and listen for passing engines, cars or trains, to ascertain whether or not same are approaching before going upon the track, and if the party fails to exercise such care, he cannot recover. You are therefore instructed, that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car and in time to have kept off the track and prevented the injury to himself, and that he failed to do so, you will find for defendant .

2. You are instructed that one who enters into employment
68 atttended with the risk of injury, of which such employee has notice, or by reasonable care may have notice, cannot recover compensation from the party employing him if, by exposure to such risk he is injured; that it is the duty of such employee if he is subjectd to danger on account of defective machinery, to notify the party employing him thereof, and unless the party employing him promises to remove such danger, if such an employe continues in such service, he assumes the risk occasioned on account of such exposure or risk. The evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known of the engine and flat car being used for switching purposes, it is not claimed that he protested against the same, hence, he assumed the risk incident to the use of such engine and flat car in defendant's yard, even if the same was defective appliances.

3. You are instructed that the deceased, L. D. Gentry, was at the time of his death, a fellow servant with the engineer and firemen and the switchmen working with engine number 68 at that time, and of the yardmaster working in the yard at the time said Gentry was killed and if the death of said Gentry was caused by the negligence of either of said persons, in failing to place a light or lights on said flat car, or otherwise, such negligence would be that of a fellow servant with said Gentry, for which defendant is not liable, and if you find from the evidence that the death was caused by the negligence of such person or persons, you will return a verdict in favor of the defendant, unless you find from the other charges given you that the same was on account of defective machinery.

4. The acts of negligence on the part of defendant relied on by the plaintiffs are (1) the use of a road engine with a flat car in front for switching purposes, withou having taken the precaution to place lights on the flat car; and (2) also in the use of head-light on said engine so constructed that the rays of light from it were reflected over and beyond the flat car, so that the position of the flat car could not be seen by the employees of defendant working in defendant's yard and using its track at Big Springs where such switching was being done; and (3) in not having the said yard so lighted at places therein
69 where defendant's employees were accustomed to cross its track in the pursuit of their employment.

You are instructed that as shown by the evidence (1) prior to L. D. Gentry's employment by the defendant and up to his death, said yard was not so lighted, so that inaccepting said employment said Gentry assumed the risks incident to working and being in said yard as such employee, without it being so lighted. (2) that said head light illuminated said flat car about half way, furthest from the engine, so that any employee by looking before going onto defendants tracks in said yard, could see and locate said flat car as well as said engine, and keep out of the way, as it was his duty to do. (3) That said engine and flat car was being used temporarily for switching purposes, the regular switch engine being in the shops for repairs, the flat car being attached to the engine for the safety of switchmen using the same; that a head light, reflecting its rays for several hundred yards was attached to the front of the engine and shed its light over and made apparent the far end of the flat car and illuminated on beyond the track, so that anyone looking and exercising proper care before going on the track could see the same so as to avoid being run over; that the use of said engine and flat car under the existing circumstances was not negligence towards said Gentry, wherefore, no negligence has been shown on the part of defendant, hence you will find a verdict for the defendant.

5: You are further instructed. (1) that if you find and believe from the evidence that the deceased, L. D. Gentry, knew, or could by the exercise of care have known of, become aware of the approaching train, and could by the exercise of ordinary care and diligence either kept off of the track or gotten off of the same in time to prevent the accident, and he failed to use such ordinary care and diligence, then you will find for the defendant. You are instructed by the term "ordinary care" is meant such care or diligence as a prudent man would exercise under like circumstances. (2) You are instructed that the evidence in this case shows that L. D. Gentry, if he was run over by said flat car and engine, stepped on defendant's track just in front of same, if he had exercised proper
70 care in looking for approaching engines, cars or trains before going on the track, he would have seen the same and could have avoided the accident; that in so going upon the track was guilty of contributory negligence, and plaintiffs are not entitled to recover herein, hence you will find a verdict for the de-

fendant.

6. You are instructed that the plaintiffs in this cause have failed to prove their case, and have shown no right to recover; you are therefore instructed to find for the defendant.

These special instructions the court refused, and the defendant then and there excepted before the jury retired to the action of the court upon each of said six special instructions, at the time of the refusal thereof, and this bill of said exceptions was tendered, allowed, signed and sealed by the court.

And thereupon the court charged the jury as follows:

"1st. In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1890, was run over and killed by a flat car of defendant, propelled by a switch engine in its yards at Big Springs, Texas; at the time of his death he was an engineer of defendant 35 years old, and earning from $150.00 to $160.00 per month; that he left surviving him his wife May Gentry, 26 years old and two children, Thomas Gentry, now three years old, and Olive Lee now seven years old, and his mother, Mary A. Gentry, who is a widow and to whose support he contributed $15.00 to $25.00 per month; that his mother was about 75 years old at the time of Louis D. Gentry's death.

2nd. Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing said track for any other purpose. You are further instructed that defendant in switching the cars where said Gentry was killed was not required to furnish absolutely safe machinery to do switching at that place, but only to use reasonably safe machinery to do said switching, and if you find from the evidence that the road engine and flat car used on the occasion when said Gentry was killed was

71 reasonably safe and was fairly adapted for switching purposes at Big Springs, then you will find for defendant.

3rd. If, however, you find from the evidence that said road engine and flat car used by defendant in switching when said Gentry was killed were not adapted to switching purposes and that as appliances for that purpose they were unsafe by reason of the way the light from the headlight struck the flat car and track of the road or from other defects disclosed by the evidence, and that said Gentry's death was directly occasioned by said defects, without any fault or negligence on his part, then you will find for plaintiffs.

4th. In considering whether the road engine and flat car used on defendant's road at the time said Gentry was killed were safe or unsafe appliances to be used in switching, your attention is asked to all the evidence pro and con on that subject, such as the opinion of the witnesses, the custom of this particular railroad, the effect of attaching flat cars, the effect of the engine light in lighting up the flat car and track, the effect of the pilot.

5th. A corporation is liable in damages to its employee who is injured by the use of defective machinery or machinery not adapted to the purposes for which it is used. The master, however, is not responsible if the employee had full knowledge of such defect or want of adaptability of the machinery used, to the purposes for which it was used, nor is he liable if deceased contributed, by his own neglect to his death.

6th. Louis D. Gentry was a fellow servant of the employees of defendant operating the switching train that killed him. The defendant is therefore not responsible for any negligence that caused his death, but if responsible at all, it must be under the 3rd and 5th charge above."

The court having so charged the jury and the same being all of the charge, except that portion of the charge relating to the measure of damages, gave them the following special instruction, requested by plaintiffs:

"The law does not exact of an employee the use of diligence in ascertaining defect in the appliances or instruments furnished by a railroad company, but charges him with knowledge of such only as are open to his observation. Beyond that he has a right to presume without inquiry or investigation, that his employer has discharged its duty of furnishing safe and proper instruments and appliances."

72

The court then and there gave the jury the following special instruction, requested by the defendant:

"You are further instructed that railway companies are not required to furnish the best and latest appliances, but the appliances and machinery used by them in the carrying out of their business must be reasonably safe, and they are only required to exercise ordinary care to select and keep their appliances and machinery in safe condition. By "ordinary care" is meant such care as a person of ordinary prudence would exercise under like circumstances. You are therefore instructed, that if

you find and believe from the evidence that the engine and flat car used for switching purposes was reasonably safe, and that the Texas & Pacific Railway Company exercised ordinary care in the selection of same, and the injury complained of was not the result of a failure on the part of t e Texas & Pacific Railway Company, to exercise such ordinary care, then you will find for the defendant."

And to said charge of the court given the jury, defennant in open court then and th re excepted:

1. To that portion of the charge (1st paragraph) which assumes and instructs the jury that there is no dispute in this case as to L. D. Gentry's having been run over and killed by a flat car of defendant propelled by a switch engine in its yards at Big Springs, for the reason that this was a controverted fact, and should have been submitted to the jury for their conclusion from the evidence.

2. To all that portion of said charge (paragraph 2) with respect to the degree of care incumbent upon deceaaed in crossing defendant's track, for the reason, the charge failed to instruct the jury as to what degree of care was required of him. It failed to instruct the jury that it was his duty to look and listen for passing engines, cars or trains, before going upon the track. It failed to instruct the jury that if he saw the train, or by the exercise of ordinary care, could have seen the same, and attempted to cross the track and stepped on the track just in front of the car, that his own contributory negligence would prevent a recovery therein. The charge merely instructs the jury
73 that "the deceased assumed the risks naturally incident to crossing the railroad track of defendant at Big Springs, to reach his car, or in crossing said track for any other purpose."

3. To that portion of the charge (4th paragraph) confining the jury to evidence only as to the custom of this particular railroad (the defendent) in its use of the road engine and flat car for switching purposes, for the reason the evidence shows, which evidence was admitted without objection, the custom existed as to many other roads in and out of Texas, of use such appliances for switching purposes.

4. To all that portion of the charge (5th paragraph) with respect to whether L. D. Gentry assumed the risk incident to the use of the road engine and flat car for switching purposes

in the yards, for the reason the charge only exonerates the defendant from liability in the event said L. D. Gentry had full knowledge of the defect or want of adaptability of the machinery used, when, in fact, the servant can not recover of the master, if the former knew, or by the exercise of ordinary care could have known of the defective machinery.

5. To all that portion of the charge (3rd paragraph) which instructs the jury that if the machinery was unsafe "by reason of whether the light from the head light struck the flat car and track of the road, or from other defects disclosed by the evidence," and that the same occasioned death of L. D. Gentry defendant would be liable, for the reason that as charged in paragraph 6th by the court L. D. Gentry was a fellow servant of the employes operating the machinery used for switching, and if his death was caused by a defect caused by said employees failing to place one of their lanterns on the far end of the flat car from the engine, which the jury could conclude was embraced in "other defects disclosed by the evidence" the defendant would not be liable on account of such defects.

The court then and there overruled said exceptions to the charge, and the defendant tenders this its bill thereof, which is allowed, signed and sealed.

74 And to the said special instruction requested by plaintiffs and given by the court to the jury, in effect that it was not incumbent on L. D. Gentry to use dilligence in ascertaining defects in the appliances, the defendant in open court then and there excepted, for the reason that the defects, if any existed, were patent, and it is the duty of an employee to use ordinary care to observe patent defects, and the instruction was incorrect.

And thereupon the jury retired and after considering, returned a verdict, which is copied in the judgment herein and to the rendition of the judgment upon said verdict defendant objected: 1. On the ground that the same was contrary to the special instruction given by the court to the jury at the request of the defendant, in that the evidence showed that the engine and flat car were not defective and were reasonably safe for switching purposes, and in accord with said special instruction, a verdict should have been rendered for the defendant.

2. On the ground that the verdict was contrary to the charge of the court (par. 6) which instructed the jury as follows:

"L. D. Gentry was fellow servant of the employees of the defendant operating the switching train that killed him. The defendant is therefore not responsible for any negligence that caused his death, but if responsible at all must, be under the 3rd and 5th charges above," for the reason, if L. D. Gentry was killed by the engine and flat car, which is not admitted, and if the same did not result from his own negligence, which is charged, it resulted from the negligence of said employees operating said engine and flat car, in failing to put one of their lanterns on the front end of the flat car furthest from the engine, when moving about in the yard; hence, verdict and judgment should have been for the defendant, and the judgment shown in the record herein was rendered and entered over the objections of the defendant.

And thereafter the defendant moved the court, on the grounds stated in its motion for a new trial, contained in the record herein to set aside said judgment, and the said motion was overruled, and now tenders this its bill of exceptions hereinbefore fully stated, and asks that the same be allowed by the court, signed and sealed, all of
75 which is now here accordingly so done.

Allowed, this March 7th, 1893.

JOHN B. RECTOR,
U. S. Dist. Judge.

The foregoing has the following endorsement, to-wit: No. 1377. In the U. S. Circuit Court for the Northern District of Texas, a Dallas. May Gentry et al. vs. Texas & Pacific Rwy. Co. Bill of exceptions Filed Mch 7, 1893. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

Assignment of Errors.

Flled March 11, 1893.

In the Circuit court of the United States, for the Northern District of Texas, at Dallas.

MAY GENTRY ET AL.
vs.
THE TEXAS & PACIFIC RAILWAY CO. } No. 1377.

Assignment of Errors.

Now comes the defendant, the Texas & Pacific Railway Company, by its counsel, and says that in the record and pro-

ceedings in the above entitled and numbered cause, there is manifest error in this, viz:

1. The trial court erred in refusing to give the jury defendant's 6th special instruction, as follows:

"You are instructed that plaintiffs in this case have failed to prove their case, and have shown no right to recover. You are therefore instructed to find for the defendant";

Because plaintiffs sue for the death of L. D. Gentry, an employee of defendant (locomotive engineer) residing at . ig Springs, Texas, on account of his being run over and killed by a road engine and flat car being used for switching purposes at night, with a head-light buring on the engine, and without a light or lights on the far end of the flat car from the engine to warn employees passing through the yard, the said engine and flat car being used in defendant's yard at Big Springs, Texas, instead of a regular switch engine; for the reason all the
76 evidence introduced upon the the trial (1) fail to show that he was killed by said engine and flat car; (2) and does show that if he was killed by the same, that it was by reason of said L. D. Gentry's carelessness in stepping on defendant's track in front of the same, when, if he had looked, he could have seen the same and avoided the accident. (3) And further shows that defendant's regular switch engine was temporarily disabled and was in the shop at Big Spring being repaired; that under such circumstances it was proper and customary, as was known to said L. D. Gentry or by the exercise of ordinary care could have been known to him, for defendant to use for switching purposes said engine and flat car. (4) And that if the accident resulting in the death of said L. D. Gentry was caused from the fact that there was not a light or lights on the flat car at the time it is claimed L. D. Gentry was killed by the engine and flat car, that it was the duty of the employees operating said engine and flat car to have had a light or lights on the flat car, and that such employees were fellow servants of said L. D. Gentry, and that on account of any negligence on their part in failing to so light said car, defendant is not liable. The evidence wholly fails to establish any liability whatever on the part of the defendant for and on account of the death of said L. D. Gentry, and the jury should have been instructed to find a verdict for the defendant.

2. The court erred in failing and refusing to give to the jury the first special instruction requested by the defendant as fol-

lows:

"You are instructed that it is the duty of an employee or any other person about to cross a railroad track to look and listen for passing engines, cars or trains, to ascertain whether or not same are approaching before going upon the track, and if the party fails to exercise such care he cannot recover. You are therefore, instructed that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car, and in time to have kept off the track and prevented the injury to himself, and he failed to do so, you will find for the defendant."

77 For the reason all the evidence clearly shows that the end of the flat car which plaintiffs claim struck and run over L. D. Gentry was illuminated and clearly shown by the head-light burning on the engine and that the bell of the engine was kept constantly ringing while switching in the yard, and if said L. D. Gentry had looked or listened before stepping upon the track in front of said engine and flat car, he would have seen the same and have known of its approach and could have avoided the accident.

3. The trial court erred in failing and refusing to give to the jury the 2nd special instruction requested by the defendant, as follows:

"You are instructed that one who enters into employment attended with risk of injury, of which such employee has notice, or by reasonable care may have notice, cannot recover compensation from the party employing him, if by exposure to such risk he is injured; that it is the duty of such employee if he is subjected to danger on account of defective machinery, to notify the party employing him thereof, and unless the party employing him promises to remove such danger, if such employee continues in such service, he assumes the risk occasioned on account of such exposure and risk. The evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known of the engine and flat car being used for switching purposes, it is not claimed that he protested against the same, hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even if the same was defective appliances."

For the reason that the evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known

that the engine and flat car were being used for switching purposes, and it is not claimed that he protested against the same, hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even should it appear that the same was defective appliances.

The uncontradicted evidence established the fact that it was the custom of the Texas and Pacific Railway Company, and it had been for years prior to Gentry's death, to use a road engine with flat car attached to the front of same for switching when the regular switch engine was
78 temporarily out of repair, and this fact being established Gentry contracted in regard to same, and it was one of the natural risks incident to his employment.

4. The trial court erred in failing and refusing to give to the jury the 3rd special instruction requested by the defendant, as follows:

"You are instructed that the deceased, L. D. Gentry, was at the time of his death, a fellow servant with the engineer and fireman and the switchmen working with engine No. 68 at the time and of the yardmaster working in the yard at the time said Gentry was killed, and if the death of said Gentry was caused by the negligence of either of said persons in failing to place a light or lights on said flat car, or otherwise, such negligence would be that of a fellow-servant with said Gentry, for which defendant is not liable, and if you find from the evidence that the death was caused by the negligence of such person or persons, you will return a verdict in favor of the defendant, unless you find from the other charges given you that the same was on account of defective machinery."

For the reason the jury should have been instructed, that if they believed from the evidence that plaintiff would not be entitled to recover on account of the death of said L. D. Gentry if a light or lights had been placed on said flat car, that defendant would not be liable herein, for the reason that it would have been the fault or negligence of said L. D. Gentry's fellow-servants in failing to have said flat car lighted, if it should have been lighted, while they were operating the same, on account of which fault or negligence defendant could not be held liable.

5. The trial court erred in failing and refusing to give to the jury the 4th special instruction requested by the defendent, as follows:

"The acts of negligence on the part of defendant relied on by the plaintiffs are (1) the use of a road engine with a flat car in front for switching purposes, without having taken the precaution to place lights on the flat car, and (2) also in the use of a head-light on said engine so constructed that the rays of light from it reflected over and beyond the flat car, so that the position of the flat car
79 could not be seen by the employees of defendant working in defendant's yard and using its track at Big Springs, where such witching was being done, and (3) in not having the said yard so lighted at places therein where defendant's employees were accustomed to cross the track in the pursuit of their employment.

You are instructed that as shown by the evidence, (1) prior to L. D. Gentry's employment by defendant and up to the time of his death, said yard was not so lighted, so that in accepting said employment said Gentry assumed the risks incident to working and being in said yard as such employee, without its being so lighted. (2) That said head-light illuminated said flat car about half way furthest from the engine, so that any employee by looking before going on defendant's tracks in said yard could see and locate said flat car as well as said engine and keep out of the way, as it was his duty to do. (3) That said engine and flat car was being used temporarily for switching purposes, the regular switch engine being in the shops for repairs—the flat car being attached to the engine for the safety of switchmen using the same. That the head-light reflecting its rays for several hundred yards was attached to the front of the engine and shed its light over and made apparent the far end of the flat car, and illuminated on beyond upon the track, so that anyone looking and exercising proper care before going on the track, could see the same so as to avoid being run over; that the use of said engine and flat car, under the existing circumstances was not negligence towards said Gentry, wherefore, no negligence has been shown on the part of defendant, hence, you will find a verdict for the defendant."

For the reason that plaintiff's alleged cause of action and the evidence introduced upon the trial was correctly stated therein, and from the same defendant is in no wise liable for damages on account of the death of said L. D. Gentry.

6. The trial court erred in failing and refusing to give the

5th special instruction requested by defendant, as follows:

"You are further instructed, (1) That if you find and believe from the evidence that the deceased, L. D. Gentry,
80 knew or could by the exercise of care have known or become aware of the approaching train, and could by the exercise of ordinary care and diligence either kept off of the track or gotten off of the same in time to prevent the accident, and he failed to use such ordinary care and diligence, then you will find for the defendant. You are instructed by the term "ordinary care" is meant such care or diligence as a prudent man would exercise under like circumstances. (2) You are instructed that the evidence in this case shows that L. D. Gentry, if he was run over by said flat car and engine, stepped on defendant's track just in front of same, when if he had exercised proper care in looking for approaching engines, cars or trains before going on the track, he would have seen the same, and could have avoided the accident; that in so going upon the track was guilty of contributory negligence, and plaintiffs are not entitled to recover herein, hence you will find a verdict for the defendant."

For the reason the evidence conclusively shows that if said L. D. Gentry had looked before stepping upon the track that he would have known of the approaching engine and car and by the exercise of ordinary care could have prevented the accident resulting in his death. The evidence conclusively shows that if said L. D. Gen ry was killed by said engine and flat car, it was on account of his own contributory negligence in failing to look out for danger before stepping upon the track.

7. The trial court erred in charging the jury in paragraph 1 of his charge, as follows:

"In this case there is no dispute about the following facts: Louis D. Gentry on the night of the 13th of March, 1891, was run over and killed by a flat car of defendant propelled by a switch engine in its yards at Big Springs, Texas."

Because the charge assumes as an uncontroverted fact, and instructs the jury that there is no dispute in this case as to L. D. Gentry's having been run over and killed by a flat car and defendant propelled by the engine in its yard at Big Springs, when this was a controverted and material fact and was wholly unestablished by the plain-

tiffs, and this fact should been submitted to the jury for
81 their conclusion from the evidence.

8. The trial court erred in charging the jury in paragraph 2 of his charge, as follows:

"Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing said track for any other purpose."

Because the charge failed to instruct the jury as to what degree of care was required of him; it failed to instruct the jury that it was the duty of deceased to look and listen for passing engines, cars and trains before going upon the track, as requested by defendant in its special instruction. It failed to instruct the jury that if he saw the train or by the exercise of ordinary care could have seen the same and attempted to cross the track and stepped on the track just in front of the car, that his own contributory negligence would prevent a recovery. The charge merely instructs the jury that the deceased assumed the risk naturally incident to crossing the track of defendant to reach his car or for any other purpose.

9. The trial court erred in charging the jury in paragraph 4 in confining the jury to evidence only as to the custom of the particular railroad, the defendant, in its use of a road engine and flat car for switching purposes; for the reason the evidence shows (which evidence was admitted without objection) that the custom of using such appliances existed on many other roads in and out of Texas, and that the use of the same was customary and usual and was in no wise negligence.

10. The trial court erred in charging the jury in paragraph 5th of his charge as follows:

"A corporation is liable in damages to its employee who is injured by the use of defective machinery or machinery not adapted to the purposes for which it is used. The master, however, is not responsible if the employee had full knowledge of such defect or want of adaptability of the machinery used to the purposes for which it is used."

For the reason the charge only exonerates the defendant from liability in event said L. D. Gentry had full knowledge of the defect or want of adaptability of the
machinery used, when in fact the servant cannot recover
82 of the master when the former knew, or by the exer ise of ordinary care could have known of the defective ma-

chinery.

11. The trial court erred in paragraph 3rd of his charge, in charging the jury that if the machinery was defective and unsafe by reason of whether the light from the head-light struck the flat car and track on the road, or from other defects disclosed from the evidence, and the same occasioned the death of L. D. Gentry the defendant would be liable; for the reason that as charged in paragraph 6th by the court, L. D. Gentry was a fellow-servant of the employees operating the machinery used for switching, and if his death was caused by a defect caused from said employees failing to place one of their lanterns on the far end of the flat car from the engine, which the jury could conclude was embraced in "other defects disclosed by the evidence," and defendant would not be liable on account of such defects.

12. The trial court erred in giving to the jury the special instruction requested by plaintiffs as follows:

"The law does not exact of an employee the use of diligence in ascertaining defects in the appliances or instruments furnished by railroad companies, but charges him with knowledge only of such as are open to his observation. Beyond that he has a right to presume without inquiry or investigation, that his employer has discharged its duty of furnishing safe and proper instruments and appliances."

Because the defects, if any existed in said engine and flat car so far as the use of the same was dangerous said L. D. Gentry, were patent defects, and it is the duty of an employee to use ordinary care to observe patent defects, and the instruction was incorrect.

13. The trial court erred in rendering a judgment herein upon the verdict of the jury, for the reason that the same was contrary to the special instruction given by the court to the jury, as the request of defendant, which special instruction was as follows:

"You are further instructed that railway companies are not required to furnish the best and latest appliances, but the appliances used by them in the carrying out of their business must be reasonably safe, and they are only re-
83 quired to exercise ordinary care to select and keep their appliances and machinery in safe condition By "ordinary care" is meant such care as a person of ordinary prudence would exercise under like circumstances. You are therefore instructed that if you find and believe from the evidence that the

engine and flat car used for switching purposes was reasonably safe and that the Texas and Pacific Railway Company exercised ordinary care in the selection of same, and the injury complained of was not the result of failure on the part of the Texas and Pacific Railway Company to exercise such ordinary care, then you will find for the defendant."

14. The trial court erred in rendering a judgment upon the verdict of the jury herein, for the reason that the same was contrary to the charge of the court, in the 6th paragraph, which instructed the jury as follows:

"L. D. Gentry was a fellow servant of the employees of the defendant operating the switching train that killed him, and defendant is therefore not responsible for any negligence that caused his death, but if responsible at all, must be under the the third and fifth charges above.

For if L. D. Gentry was killed by the engine and flat car, which is not admitted, and if the same did not result from his own negligence, which is charged, it resulted from the negligence of said employees operating said engine and flat car in failing to put one of their lanterns on the front end of the flat car furthest from the engine when moving about in the yard, hence the verdict and judgment should have been for the defendant.

15. The trial court erred in admitting in evidence, over objections of defendant, the testimony of the witness, Earnest Harrison, as follows:

"I think he, L. D. Gentry, was killed while walking across the track from his home to the engine."

Because said witness was not present when L. D. Gentry was killed, and did not see or know how he met his death, as shown by the witness' evidence; hence, the statement objected to was a mere guess and inadmissible.

16. The trial court erred in admitting, over objection of defendant, the evidence of the witness, Earnest Harrison, as follows:

"I have never in my life seen a head light placed on a flat
84 car, but I have frequently seen a white lantern so placed at the furthest end from the engine, and saw it done many times at Big Springs."

Because such evidence was inadmissible, not being responsive to the interrogatory, which was as follows:

"7th Cross Interrogatory—If in answer to the 7th direct in-

Writ of Error Bond.

Filed March 11, 1893.

In the United States Circuit Court, for the Northern District of Texas, at Dallas.

MAY GENTRY ET AL.,
vs.
THE TEXAS & PACIFIC RY. CO. } No. 1377.

Know all men by these presents, That we, the Texas & Pacific Railway Company, a corporation duly incorporated by and organized under an act of the Congress of the United States, as principal, and J. S. Armstrong and C. A. Keating as sureties, are held and firmly bound unto May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, their executors, administrators or assigns, in the just and full sum of fifteen thousand dollars ($15,000.00), to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators jointly and severally by these presents Sealed with our seals and dated this the 11th day of March, in the year of our Lord 1893.

Whereas, lately at a term of the Circuit court of the United States for the Northern District of Texas, at Dallas, in a suit pending in said court between May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A.
87 Gentry, plaintiffs, and the Texas & Pacific Railway Company, defendant, numbered 1377 on the docket of said court, a judgment was rendered against the said Texas & Pacific Railway Company on the 31st day of January A. D. 1893, that plaintiffs, by their suit, recover of the defendant, the sum of $10,166.66, apportioned among plaintiffs as follows: May Gentry, $4,166.66; Olive Lee Gentry, $2,500.00, Thomas M Gentry, $2,500.00; Mary A. Gentry, $1000.00, as well as all costs of suit, and the said Texas & Pacific Railway Company having obtained a writ of error and filed a copy thereof in the office of the clerk of said court, to reverse the judfiment in the aforesaid suit, and a citation directed to the said May Gentry, Olive Lee Gentry, homas M. Gentry and Mary A. Gentry, and their attorney of record, Charles I. Evans, Esq., citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fifth Circuit, within thirty days from the 11th day of March

A. D. 1893, at the regular term of said court to be holden at the city of New Orleans, State of Louisiana, on the third Monday of November next.

Now the condition of the above obligation is such, that if the said Texas & Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it failed to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands and seals this the 11th day March, A. D., 1893.

THE TEXAS & PACIFIC RAILWAY CO.,

(SEAL) *By Wm. H. Clark, its Agent and Attorney.*

(SEAL) J. S. ARMSTRONG,

(SEAL) C. A. KEETING,

Sealed and delivered in the presence of:

EDWD. O. TENISON.

F. HARRIS, JR.

Approved March the 11th, A. D., 1893.

JOHN B. RECTOR,

U. S. Dist. Judge.

The foregoing has the following endorsement, to-wit: In United States Ccircuit Court, Northern District of Texas, at Dallas. May Gentry et al. vs. Texas & Pacific Ry. Co. Writ of error bond. Filed Mch 11, 1893. J. H. 88 Finks, Clerk. By Chas. H. Lednum, Deputy.

Writ of Error.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
MAY GENTRY, ET AL.,
Defendants in Error.
} No. 137.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to the Honorable the Judges of the Circuit Court of the United States, for the Northern District of Texas. *Greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court before you or some of you, between May Gentry, Olive Lee Gentry; Thomas M. Gentry and Mary A. Gentry, plaintiffs, and the Texas and Pacific Railway Company, defendant, a mani-

fest error hath happened, to the great damage of the said Texas and Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then under your seal, distinctly and openly, you send a record of the proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals, for the Fifth Circuit, together with this writ, so that you have the same at the city of New Orleans, in the State of Louisiana, within thirty days from the date hereof, in the said United States Circuit Court of Appeals, to be then and there held, and the record and proceedings aforesaid being inspected, the said United States Circuit Court of appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme court of the United States, the 13th day of March, in the year of our Lord one thousand eight
89 hundred ninety-three.

(SEAL) J. H. FINKS,

Clerk Circuit Court of the United States for the Northern District of Texas.

By CHAS. H. LEDNUM, *Deputy.*

JOHN B. RECTOR,

U. S. District Judge, Northern District of Texas.

Allowed by

JOHN B. RECTOR,

U. S. District Judge, Northern District of Texas.

Endorsed—No. 1377. Texas & Pacific Railway Company, plaintiff in error, vs. May Gentry et al., defendants in error. Writ of error. Filed March 18, 1893. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

A copy of this writ of error is this day lodged in my office for the use of the defendants in error. March 18, 1893.

J. H. FINKS, *Clerk.*

by CHAS. H. LEDNUM, *Deputy.*

Citation in Error.

No. 1377.

THE TEXAS & PACIFIC RAILWAY COMPANY,
Plaintiff in Error,
vs.
MAY GENTRY ET AL.,
Defendants in Error.

UNITED STATES OF AMERICA, *ss.*

The President of the United States, to May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, *Greeting:* You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals, for the Fifth Circuit, to be holden at the city of New Orleans, in the State of Louisiana, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of Texas, at Dallas, wherein the Texas and Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 13th day of March, in the year of our Lord, one thousand eight hundred and ninety-three.

(SEAL) J. H. FINKS,
Clerk Circuit Court of the United States, Northern District of Texas.

By CHAS. H. LEDNUM, *Deputy.*

Signed by JOHN B. RECTOR,
U. S. District Judge, Northern District of Texas.

We hereby accept service of the within citation for all the within named defendants. This the 20th day of March, 1893.

CHAS. I. EVANS,
Attorney for May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry Defendants in Error.

Endorsed—No. 1377. Texas & Pacific Railway Company, plaintiff in error, vs. May Gentry, et al., defendant in error. Citation in error and acceptance of service. Filed March 21, 1893. J. H. Finks, Clerk. By Chas. H. Lednum, Deputy.

Clerk's Certificate.

I, J. H. Finks, clerk of the Circuit Court of the United States in the Fifth Circutit and Northern District of Texas, do hereby certify that the above and foregoing is a full, true and correct transcript of the record in cause No 1,377, wherein May Gentry et al., are plaintiffs, and the Texas & Pacific Railway Company is defendant, except that the original citation in and writ of error are included therein instead of the copies thereof, as fully as the same remains on file and of record in my office at Dallas, Texas.

Witness, my hand and officially and the seal of said court, at Dallas, Texas, this 21st day of March, 1893.

(SEAL) J. H. FINKS, *Clerk.*
by CHAS. H. LEDNUM, *Deputy.*

Endorsed.
Filed March 27. 1893.

57 *Hearing and Submission.*

Extract from the Minute Book, November term, 1892.

JUNE 20, 1893.

TEXAS AND PACIFIC RAILWAY COMPANY
v.
MAY GENTRY *et al.* } No. 124.

This cause came on this day to be heard, and thereupon the Hon. A. P. McCormick announced that he was disqualified from hearing the same and retired from the bench, and the further proceedings herein were had before their honors Don A. Pardee, circuit judge, and James W. Locke, district judge, and after argument by Mr. William H. Clark, for plaintiff in error; Mr. Chas. I. Evans, for defendant in error, and in conclusion by Mr. T. J. Freeman, for pl'ff in error, was submitted to the court upon briefs of counsel filed herein.

Final Judgment.

Extract from the Minute Book.

JUNE 27, 1893.

TEXAS & PACIFIC RAILWAY COMPANY
v.
MAY GENTRY *et als.* } No. 124.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the northern district of Texas and was argued by counsel.

On consideration whereof it is now here ordered and ad-
58 judged that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

It is further ordered and adjudged that the plaintiff in error, The Texas & Pacific Railway Company, and the sureties on the writ-of-error bond herein, J. S. Armstrong and C. A. Keeting, be condemned to pay the costs of this cause in this court, for which execution may be issued out of said circuit court.

59 *Assignment of Errors.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS AND PACIFIC RAILWAY COMPANY
vs.
MAY GENTRY *et als.* } No. 124.

Now comes The Texas and Pacific Railway Company, plaintiff in error, by its attorney, and says that in the record and proceedings in the above-entitled cause there is manifest error, in this, to wit:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are instructed that plaintiffs in this case have failed to prove their case and have shown no right to recover. You are therefore instructed to find for the defendant.

Because plaintiffs sue for the death of L. D. Gentry, an employé of defendant (locomotive engineer), residing at Big Springs, Texas, on account of his being run over and killed by a road engine and flat car being used for switching purposes at night, with a head-light burning on the engine and without a light or lights on the far end of the flat car from the engine to warn employés passing through the yard, the said engine and flat car being used in defendant's yard at Big Springs, Texas, instead of a regular switch engine, for the reason all the evidence introduced upon the trial (1) failed to show that he was killed by said engine and flat car, (2) and does show that if he was killed by the same that it was by reason of said L. D. Gentry's carelessness in stepping on defendant's track in front of the same, when, if he had looked, he could have seen the same and avoided the accident; (3) and further shows that defendant's regular switch engine was temporarily disabled and was in the
60 shop at Big Springs, being repaired; that under such circumstances it was proper and customary, as was known to said L. D. Gentry or by the exercise of ordinary care, could have been known to him, for defendant to use for switching purposes said engine and flat car; (4) and that if the accident resulting in the death of said L. D. Gentry was caused from the fact that there was not a light or lights on the flat car at the time, it is claimed L. D. Gentry was killed by the engine and flat car; that it was the duty of the employés operating said engine and flat car to have had a light or lights on the flat car, and that such employés were fellow-servants of said L. D. Gentry, and that on account of any negligence on their part in failing to so light said car defendant is not liable." The evidence wholly fails to establish any liability whatever on the part of defendant for and on account of the death of said L. D. Gentry, and the jury should have been instructed to find a verdict for the defendant.

II.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are instructed that it is the duty of an employé or any other person about to cross a railroad track to look and listen for passing engines, cars, or trains, to ascertain whether or not the same are approaching, before going upon the track, and if the party fails to exercise such care he cannot recover. You are, therefore, in-

structed that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car, and in time to have kept off the track and prevented the injury to himself, and he failed to do so, you will find for the defendant, for the reason all the evidence clearly shows that the end of the flat car which plaintiffs claim struck and run over L. D. Gentry was illuminated, and clearly shown by the head-light burning on the engine, and that the bell of the engine was kept constantly ringing while switching in the yard, and if said L. D. Gentry had looked or listened before stepping upon the track in front of said engine and flat car he would have seen the same and have known of its approach and could have avoided the accident."

III.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

61 "You are instructed that one who enters into employment attended with risk of injury of which such employé has notice, or by reasonable care may have noticed, cannot recover compensation from the party employing him if by exposure to such risk he is injured; that it is the duty of such employé, if he is subjected to danger on account of defective machinery, to notify the party employing him thereof, and unless the party employing him promises to remove such danger, if such employé continues in such service, he assumes the risk occasioned on account of such exposure and risk. The evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known, of the engine and flat car being used for switching purposes. It is not claimed that he protested against the same; hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even if the same were defective appliances, for the reason that the evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known, that the engine and flat car was being used for switching purposes, and it is not claimed he protested against the same; hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even should it appear that the same were defective appliances.

"The uncontradicted evidence established the fact that it was the custom of the Texas & Pacific Railway Company, and had been for years prior to Gentry's death, to use a road engine with flat car attached to the front of the same for switching when the regular switch engine was temporarily out of repair, and, this fact being established, Gentry contracted in regard to same and it was one of the natural risks incident to his employment."

IV.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in

failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are instructed that the deceased, L. D. Gentry, was at the time of his death a fellow-servant with the engineer and fireman and the switchman working with engine No. 68 at the time, and of the yard-master working in the yard at the time said Gentry was killed, and if the death of said Gentry was caused by the negligence of either of said persons in failing to place a light or lights on said flat car or otherwise, such negligence would be that of a fellow-servant with said Gentry, for which defendant is not liable, and if you find from the evidence that his death was caused by the negligence of such person or persons you will return a verdict in favor of defendant unless you find from the other charges given you that the same was on account of defective machinery."

For the reason the jury should have been instructed that if they believed from the evidence that plaintiffs would not be entitled to recover on account of the death of said L. D. Gentry if
62 a light or lights had been placed on said platform that defendant would not be liable herein, for the reason that it would have been the fault or negligence of said L. D. Gentry's fellow-servant in failing to have said flat car lighted, if it should have been lighted while they were operating the same, on account of which fault or negligence defendant could not be held liable.

V.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"The acts of negligence on the part of defendant relied on by the plaintiffs are (1) the use of a road engine with a flat car in front for switching purposes without having taken the precaution to place lights on the flat car, and (2) also in the use of a head-light on said engine so constructed that the rays of light from it reflected over and beyond the flat car, so that the position of the flat car could not be seen by the employés of defendant working in defendant's yard and using its track at Big Springs, where such switching was being done, and (3) in not having the said yard so lighted at places therein were defendant's employés were accustomed to cross the track in the pursuit of their employment.

You are instructed that, as shown by the evidence, (1) prior to L. D. Gentry's employment by defendant and up to the time of his death said yard was not so lighted, so that in accepting said employment said Gentry assumed the risk incident to working and being in said yard as such employé without its being so lighted; (2) that said head-light illuminated said flat car about half way furthest from the engine, so that any employé by looking before going on defendant's track in said yard could see and locate said flat car as well as said engine and keep out of the way, as it was his duty to do; (3) that said engine and flat — *was* being used temporarily for

switching purposes, the regular switch engine being in the shops for repairs, the flat car being attached to the engine for the safety of switchmen using the same; that the head-light, reflecting its rays for several hundred yards, was attached to the front of the engine and shed its light over and made apparent the far end of the flat car and illuminated on beyond upon the track, so that any one looking and exercising proper care before going on the track could see the same so as to avoid being run over; that the use of said engine and flat car, under the existing circumstances, was not negligence towards said Gentry; wherefore no negligence has been shown on the part of defendant; hence you will find a verdict for the defendant."

For the reason that plaintiffs' alleged cause of action and the evidence introduced upon the trial was correctly stated therein, and from the same the defendant is in nowise liable for damages on account of the death of said L. D. Gentry.

63 VI.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are further instructed (1) that if you find and believe from the evidence that the deceased, L. D. Gentry, knew or could by the exercise of care have known or become aware of the approaching train and could by the exercise of ordinary care and diligence either kept off of the track or gotten off of the same in time to have prevented the accident and he failed to use such ordinary care and diligence, then you will find for the defendant; you are instructed by the term 'ordinary care' is meant such care or diligence as a prudent man would exercise under like circumstances; (2) you are instructed that the evidence in this case shows that L. D. Gentry, if he was run over by said flat car and engine, stepped on defendant's track just in front of same, when if he had exercised proper care in looking for approaching engines, cars, or trains before going on the track he would have seen the same and could have avoided the accident; that in so going upon the track he was guilty of contributory negligence and plaintiffs are not entitled to recover herein; hence you will find a verdict for the defendant," for the reason the evidence conclusively shows that if said L. D. Gentry had looked before stepping upon the track that he would have known of the approaching engine and car and by the exercise of ordinary care could have prevented the accident resulting in his death. The evidence conclusively shows that if said L. D. Gentry was killed by said engine and flat car it was on account of his own contributory negligence in failing to look out for danger before stepping upon the track.

VII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 1 of his charge as follows:

"In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1891, was run over and killed by a flat car of defendant propelled by a switch-engine it its yards at Big Springs, Texas," because the charge assumes as an uncontroverted fact and instructs the jury that there is no dispute in this case as to L. D. Gentry's having been run over and killed by a flat car of defendant propelled by the engine in
64 its yard at Big Springs, when this was a controverted and material fact and was wholly unestablished by the plaintiffs, and this fact should have been submitted to the jury for their conclusion from the evidence.

VIII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 2 of his charge as follows:

"Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing said track for any other purpose."

Because the charge failed to instruct the jury as to what degree of care was required of him. It failed to instruct the jury that it was the duty of deceased to look and listen for passing engines, cars, and trains before going upon the track, as requested by defendant in its special instruction. It failed to instruct the jury that if he saw the train or by the exercise of ordinary care could have seen the same and attempted to cross the track and stepped on the track just in front of the car that his own contributory negligence would prevent a recovery. The charge merely instructs the jury that the deceased assumed the risk naturally incident to crossing the track of defendant to reach his car or for any other purpose.

IX.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in confining the jury by paragraph 4 of its charge to evidence only as to the custom of the particular road, the defendant, in its use of a road engine and flat car for switching purposes, for the reason the evidence shows (which evidence was admitted without objection) that the custom of using such appliences existed on many other roads in and out of Texas, and that the use of the same was customary and usual and was in nowise negligence.

65 X.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 5 of his charge as follows:

"A corporation is liable in damages to its employé who is injured by the use of defective machinery or machinery not adapted to the purpose for which it is used. The master, however, is not responsible if the employé had full knowledge of such defect or want of adaptibility of the machinery used for the purposes for which it is used," for the reason the charge only exonerates the defendant from liability in event said L. D. Gentry had full knowledge of the defect or want of adaptibility of the machinery used, when, in fact, the servant cannot recover of the master when the former knew or by the exercise of ordinary care could have known of the defective machinery.

XI.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 3 of his charge that if the machinery was defective and unsafe by reason of whether the light from the head-light struck the flat car and track on the road or from other defects disclosed from the evidence and the same occasioned the death of said L. D. Gentry the defendant would be liable for the reason that, as charged in paragraph 6 by the court, L. D. Gentry was a fellow-servant of the employés operating the machinery used for switching, and if his death was caused by a defect caused from said employés failing to place one of their lanterns on the far end of the flat car from the engine, which the jury could conclude was embraced in "other defects disclosed by the evidence," and defendant would not be liable on account of such defects.

66 XII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in giving to the jury special instruction requested by plaintiffs as follows:

"The law does not exact of an employé the use of diligence in ascertaining defects in the appliances or instruments furnished by railroad companies, but charges him with knowledge only of such as are open to his observation; beyond that he has a right to presume without inquiry or investigation that his employer has discharged its duty of furnishing safe and proper instruments and appliances," because the defects, if any existed in said engine and flat car, so far as the use of same was dangerous to said L. D. Gentry, were patent defects, and it is the duty of an employé to use ordinary care to observe patent defects, and the instruction was incorrect.

XIII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in rendering the judgment upon the verdict of the jury, for the reason that the same was contrary to the charge of the court in

the 6th paragraph of said charge, which instructed the jury as follows:

"L. D. Gentry was a fellow-servant of the employés of the defendant operating the switching train that killed him, and defendant is, therefore, not responsible for any negligence that caused his death, but if responsible at all must be under the third and fifth charges above," for that if L. D. Gentry was killed by the engine and flat car, which is not admitted, and if the same did not result from his own negligence, which is charged, it resulted from the negligence of said employés operating said engine and flat car in failing to put one of their lanterns on the front end of the flat car furthest from the engine when moving about in the yard; hence the verdict and judgment should have been for the defendant.

XIV.

The said circuit court of appeals erred in its judgment affirming
67 ing the judgment of the circuit court for the northern district of Texas in admitting in evidence, over the objection of defendant, the testimony of the witness Earnest Harrison, as follows:

"I think he, L. D. Gentry, was killed while walking across the track from his home to the engine," because said witness was not present when L. D. Gentry was killed and did not see or know how he met his death, as shown by the witness' evidence; hence the statement objected to was a mere guess and inadmissible.

XV.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in admitting, over the objection of defendant, the evidence of the witness Earnest Harrison, as follows:

"I have never in all my life seen a head-light placed on a flat car, but I have frequently seen a white lantern so placed at the furthest end from the engine, and saw it done many times at Big Springs," because such evidence was inadmissible, not being responsive to the interrogatory, which was as follows:

7th cross-interrogatory. If, in answer to the 7th direct interrogatory, you say that a head-light placed on the front end of a flat car furthest from the engine referred to would conduce to safety, please state if it is not a fact that in all the experience of your life you have never seen a head-light fastened on the front end of a flat car which was coupled to a road engine while used for switching purposes. If you ever saw it please state when and where, upon what road, and under whose supervision. Have you seen it more than once? If so, please specify each time and place where you saw it.

Defendant further objected for the reason that the witness does not show when and where he saw such white lantern so placed, whether on this car or some other car or whether before or after this accident.

XVI.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in admitting, over the objection of defendant, the testimony of Thomas A. Gentry, as follows:

"He, L. D. Gentry, was killed by being run over by a flat car attached to and ahead of engine No. 6, which was being
68 used for a switch-engine in Big Springs, T. & P. railway yards," because the witness was not present when L. D. Gentry was killed and did not see or know how he met his death, as shown by the witness' evidence; hence the statement objected to was a mere guess and inadmissible.

Wherefore The Texas and Pacific Railway Company, plaintiff in error, prays that said judgment or decree be reversed; and it will ever pray.

(Signed) T. J. FREEMAN,
Attorney for The Texas and Pacific Railway Company, Plaintiff in Eror.

(Endorsed:) Filed July 5th, 1893.

69 *Petition for Writ of Error.*

United States Circuit Court of Appeals for the Fifth Circuit.

THE TEXAS & PACIFIC RAILWAY COMPANY, Defendant, Appellant,
vs.
MAY GENTRY and Others, Plaintiff-, Respondents.

The above-named defendant, The Texas & Pacific Railway Company, conceiving itself aggrieved by the order entered on June 27th, 1893, in the above-entitled cause, doth hereby appeal from said order to the Supreme Court of the United States, and it prays that this its appeal may be allowed, and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to the Supreme Court of the United States.

(Signed) T. J. FREEMAN,
Attorney for the Texas & Pacific Railway Company.

And now, to wit, on the 8th day of July, 1893, it is ordered that the appeal be allowed as prayed for.

(Signed) GEORGE SHIRAS, JR.,
Associate Justice Supreme Court of the United States.

(Endorsed:) Filed July 17th, 1893.

70 *Bond.*

Know all men by these presents that we, the Texas and Pacific Railway Company, a corporation duly incorporated, as principal, and Russell Sage, of the city and State of New York, as surety, are held

and firmly bound unto May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry in the full and just sum of twenty-five thousand dollars ($25,000.00), to be paid to the said May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry, their certain attorneys, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, by these presents.

Sealed with our seals and dated this the 8th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

Whereas lately, at a regular term of the United States circuit court in and for the northern district of Texas, sitting at Dallas, at the January term, 1893, in a suit pending in said court between May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry, plaintiffs, and The Texas and Pacific Railway Company, defendant, a judgment was rendered against the said The Texas and Pacific Railway Company for the sum of ten thousand one hundred and sixty-six dollars and sixty-six cents ($10,166.66) besides costs of suit; and

Whereas the said Texas and Pacific Railway Company duly obtained a writ of error from the United States circuit court of appeals for the fifth circuit, which court, on the 27th day of June, 1893, rendered a judgment affirming the said judgment in all
71 particulars; and

Whereas the said The Texas and Pacific Railway Company has sued out a writ of error from the Supreme Court of the United States and filed a copy thereof in the aforesaid suit, and also a citation directed to said May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry, citing and admonishing them to be and appear at said Supreme Court of the United States, at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such that if the said The Texas and Pacific Railway Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

(Signed) THE TEXAS AND PACIFIC RAILWAY COMPANY,

[SEAL.] By C. E. SATTERLEE, *Sec'y & Treas.*
RUSSELL SAGE. [L. S.]

Witness:
D. D. DUNCAN.

The foregoing bond is approved.

(Signed) GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

(Endorsed:) Filed July 17th, 1893.

72 United States Circuit Court of Appeals for the Fifth Circuit.

I, James M. McKee, clerk of the United States circuit court of appeals for the fifth circuit, do hereby certify that the foregoing seventy-one pages, numbered from 1 to 71, inclusive, contain a true copy of the record and all proceedings had in the case of The Texas & Pacific Railway Company, plaintiff in error, *vs.* May Gentry and others, defendants in error, No. 124, November term, 1892, as the same remains upon the files and records of said United States circuit court of appeals.

Seal United States Circuit Court of Appeals, Fifth Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals, at the city of New Orleans, this 18th day of July, A. D. 1893.

JAMES M. McKEE,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

73 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the United States circuit court of appeals for the fifth circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court of appeals, before you or some of you, between The Texas & Pacific Railway Company, plaintiff in error, and May Gentry and others, defendants in error, a manifest error has happened, to the great damage of the said plaintiff in error, The Texas & Pacific Railway Company, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

74 Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 8th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

[Seal of the Supreme Court of the United States.]

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed this 8th day of July, 1893, by—

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

74½ [Endorsed:] Texas & Pacific Railway Company, pl'ff in error, *vs.* May Gentry *et al.*, def'ts in error. Writ of error.

75 UNITED STATES OF AMERICA, *ss:*

To May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry or Charles I. Evans, their attorney of record, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office United States circuit court of appeals for the fifth circuit, wherein The Texas and Pacific Railway Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the said judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable George Shiras, Jr., associate justice of the Supreme Court of the United States, this 8th day of July, in the year of our Lord one thousand eight hundred and ninety-three.

GEORGE SHIRAS, JR.,
Associate Justice of the Supreme Court of the United States.

76 On this 14 day of July, in the year of our Lord one thousand eight hundred and ninety-three, personally appeared S. H. Patterson before me, the subscriber, and makes oath that he delivered a true copy of the within citation to Charles I. Evans, attorney of record for May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry.

S. H. PATTERSON,
Deputy U. S. Marshal for the Northern Dist. of Texas.

Sworn to and subscribed the 14th day of July, A. D. 1893.

[Seal Notary Public, County of Dallas, Texas.]

W. H. COPE,
Notary Public, Dallas Co., Texas.

[Endorsed:] Texas & Pacific Railway Co., plaintiff in error, *v.* May Gentry *et als.*, defendants in error. Citation in error.

Endorsed on cover: Case No. 15,369. United States circuit court of appeals, 5th circuit. Term No., 985. The Texas & Pacific Railway Company, plaintiff in error, *vs.* May Gentry, Olive Lee Gentry, Thomas M. Gentry, and Mary A. Gentry. Filed August 2d, 1893.

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No. 15,369.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO. 985.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error

vs.

MAY GENTRY ET ALS., Defendants in Error.

ERROR TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION TO DISMISS OR AFFIRM.

A. H. GARLAND,
CHAS. I. EVANS,
ATT'S FOR DEFENDANTS IN ERROR.

The Goode Printing Co., 147 S. Ervay Street, Dallas, Tex.

No. 15,369.

In the Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM No. 985.

THE TEXAS & PACIFIC RAILWAY CO.,

Plaintiff in error,

vs.

MAY GENTRY ET ALS.,

Defendants in error.

ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS,

FOR FIFTH CIRCUIT.

MOTION TO DISMISS.

I.

Now comes the defendant in error, Mary A. Gentry, and shows to the Court, that it appears from the record in this cause, that so far as she is concerned; this court has no jurisdiction of this case, for this, that it appears from the record that her cause of action against the plaintiff in error is separate and distinct from the causes of action of her co defendants in error, in this, that in addition to the facts necessary for them to establish in order to enable them to recover it, was necessary for her to prove, and she did prove, that she had received pecuniary assistance from her son Louis D. Gentry, for negligently causing whose death this action was brought, and had reasonab e expectation of continuing to receive such pecuniary assistance from

him, had he lived; and that she was enabled to bring this action jointly with her co-defendants in error, only by reason of the statute of the State of Texas, (Revised Statutes of Texas, Art. 2904); and it farther appears from the record that a separate verdict was found in her favor for the sum of One Thousand Dollars, and a separate judgment entered thereon in her favor by the trial court against the plaintiff in error, for the sum of One Thousand Dollars; and that it further appears from the record, that the judgment or order of affirmance of the Circuit Court of Appeals, in favor of this defendant in error and against the plaintiff in error, from which this writ of error is prosecuted, does not exceed said sum of one thousand dollars; and therefore, this defendant in error says, that it appears from the record in this cause, that the matter in controversy between the plaintiff in error and herself, does not exceed one thousand dollars besides costs, as required by the act of Congress entitled: "An act to establish circuit courts of appeals to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891.

Wherefore this defendant in error prays the court to dismiss this writ of error for want of jurisdiction, so far as she is concerned, and to award a *procedendo* to the United States Circuit Court for the Northern District of Texas, commanding it to proceed to enforce its judgment in this cause.

A. H GARLAND,
CHAS. I. EVANS, att'ys,
for deft. in error Mary A. Gentry.

II.

And now come all the defendants in error, May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, and show to the court, that it appears from the record in this cause, that this court has no jurisdiction of this case by writ of error, for this, that it appears from said record, that the so called judgment or order of the United States Circuit Court of Appeals for the Fifth Circuit, to review which this writ of error was issued, simply affirms the judgment of the United States Circuit Court for the Northern District of Texas, and condemns the plaintiff in error and the sureties on

its writ of error bond, to pay the costs of said Circuit Court of Appeals, and authorizes execution to be issued out of said Circuit Court, for such costs only, but does not adjudge or specifically name any sum whatever which the defendants in error shall recover of the plaintiff in error, and the sureties on its writ of error bond, and does not authorize the trial court to issue execution for the amount of the damages adjudged against the plaintiff in error in favor of the defendants in error by the trial court; nor does said judgment, or order of said Circuit Court of Appeals finally dispose of said cause as to all of the parties thereto in said Circuit Court of Appeals, in that it makes no disposition whatever as to the sureties on the writ of error bond, who became parties to said cause after the judgment in the trial court by signing said writ of error bond, and making themselves parties to such new proceeding in said Circuit Court of Appeals; and, therefore, the judgment or order of said Circuit Court of Appeals is not such a final judgment as this court can review on writ of error.

III.

And said defendants in error further show to the court, that it appears from the record in this cause, that this court has no jurisdiction of this case, for this; that it appears from the writ of error issued herein, to remove this cause from the United States Circuit Court of Appeals for the Fifth Circuit, that all of the defendants in error are not named therein, but are designated as "May Gentry, *and others*," from which it appears that there are other parties to the action who are not named in said writ of error; and therefore, on account of such fatal defect in said writ of error, this court has no jurisdiction of this cause.

Wherefore, the defendants in error pray the court to dismiss this cause, and to issue a *procedendo* to the United States Circuit Court for the Northern District of Texas, at Dallas, commanding it to proceed to enforce its judgment.

A. H. GARLAND,
CHAS. I. EVANS, att'ys.
for said defts. in error.

MOTION TO AFFIRM.

And now come the defendants in error, May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, and in the event that the court should be of opinion, that none of the grounds for dismissing the writ of error presented in their motion to dismiss herewith filed, are well taken, and that said motion should be denied in whole, then the said defendants in error suggest to the court that said motion to dismiss, presents such color of a right to a dismissal as will authorize the court to look into the record in disposing of a motion to affirm united with such motion to dismiss

Therefore defendants in error suggest to the court, that although the record in this cause may show that this court has jurisdiction, it is manifest from an inspection thereof, that the only questions of law presented therein are well settled by the decisions of this court adversely to the plaintiff in error, and that the writ of error in this cause was sued out for delay only.

Wherefore, in the event that the motion to dismiss united herewith should be denied, the defendants in error pray the court to affirm the judgment of the court below, with such damages for delay as in the discretion of the court, may seem just and proper.

A. H. GARLAND,
CHAS. I. EVANS, att'ys,
for defts. in error.

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JAMES H. McKENNEY,
CLERK.

No. 15,369.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1893.

TERM NO. 985.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error

vs.

MAY GENTRY ET ALS., Defendants in Error.

ERROR TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN SUPPORT OF MOTION TO DISMISS OR AFFIRM.

A. H. GARLAND,
CHAS. I. EVANS,
ATT'S FOR DEFENDANTS IN ERROR.

The Goode Printing Co., 147 S. Ervay Street, Dallas, Tex.

No. 15,369.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1893.

TERM No. 985.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error,

vs.

MAY GENTRY ET ALS., Defendants in Error.

ERROR TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN SUPPORT OF MOTION TO DISMISS.

I.

The first ground of the motion to dismiss, is presented on behalf of the defendant in error, Mary A. Gentry alone; and raises the question that this court has no jurisdiction in this case, as to her, because of the matter in controversy between herself and the plaintiff in error, does not exceed one thousand dollars.

This action was brought by her as the mother of Louis D. Gentry, joined with her co-defendants in error, the surviving widow and minor children of said Louis D. Gentry, to recover damages for his death, alleged to have been caused by the negligence of the plaintiff in error. (Rec. pp. 1 to 6.)

A separate verdict was returned in her favor against the plaintiff in error, for the sum of one thousand dollars, and a separate judgment was entered thereon by the trial court, and execution ordered to issue in her favor alone, for that sum. (Rec. pp. 12 and 13.)

On writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, judgment was there entered affirming the judgment of the trial court, without specifying any sum whatever, that any of the defendants in error should recover from the plaintiff in error; without adding any interest to the judgment of the court below, but simply affirming the judgments, and condemning the plaintiff in error and the sureties on its writ of error bond, to pay the costs of the Circuit Court of Appeals. (Rec. p. 85.)

The statute of Texas, after giving the right of action for injuries resulting in death, provides: "The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased."

Revised Statutes of Texas, Art. 2903.

And it is further provided that: "The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all."

Revised Statutes of Texas, Art. 2904.

It is also provided that: "The jury may give such damages as they may think proportional to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall be alive, in such shares as the jury shall find by their verdict."

Revised Statutes of Texas, Art. 2909.

It is thus apparent, that the mother has a cause of action for negligently causing the death of her son, separate and distinct from that of his surving widow and minor children; and that it is only by reason of the provisions of the statute, that she was authorized to join them in the same suit. She might have brought a separate suit for the damages sustained by her.

G. H & S. A. Ry. Co. vs. Kutac, 72 Tex. 647–8.

In addition to this, her right of recovery is, to some extent, dependent on a different state of facts, from those which authorize the widow and minor children to recover. The law does not presume any pecuniary obligation on the adult son to contribute to the support of his mother, as it does in the case of a husband and father to support his

wife and minor children. In order to a recovery in the case of a parent, it must be shown that she had a reasonable expectation of receiving pecuniary aid and assistance from her son had he not been killed, by showing that the son recognized his moral obligation to contribute to her pecuniary assistance, by having voluntarily done so, during his lifetime, which is not necessary in an action by the surviving widow and minor children.

Mo. Pac. Ry. Co. v. Lee, 70 Tex. 502;
Dallas & Wichita Ry. Co. v. Spicker, 61 Tex. 431;
Illinois Cent. Ry. Co. v. Barron, 5 Wall. 90.

The judgments in favor of the other defendants in error, cannot be added to the judgment in favor of Mary A. Gentry, in order to make out the amount of the matter in controversy necessary to give jurisdiction, for the rule is well settled by the decisions, that distinct judgments in favor of or against distinct parties, though contained in the same record, cannot be joined to give this court jurisdiction.

Walter v. Northeastern R. R. Co., 147 U. S. 370;
Tupper v. Wise, 110 U. S. 398;
Ex Parte Balt. & Ohio R. R. Co., 106 U. S. 5.

In determining the jurisdictional sum or amount, neither interest on the judgment, nor costs of suit, can enter into the computation.

Balt. & Pot. Ry. Co. v. Trook, 100 U. S. 112;
Westn. Union Tel. Co. v. Rogers, 93 U. S. 565;
Walker v. United States, 4 Wall. 163.

The jurisdiction of this court to review the judgments of the Circuit Courts of Appeals by writ of error, is derived from the sixth section of the act of Congress of March 3, 1891, known as the Circuit Court of Appeals act, and is confined to cases in which the judgment of that court is not made final by a preceding part of the same section, and in which, "the matter in controversy shall exceed one thousand dollars besides costs."

Northern Pac. Ry. Co. v. Amato, 144 U. S. 465.

For these reasons, and by virtue of these authorities, the writ of error in this cause should be dismissed, so far as relates to the defendant in error Mary A. Gentry.

II.

The second ground of the motion to dismiss, is presented on behalf of all the defendants in error, and raises the question, that this court has no jurisdiction of this cause, for the reason that the judgment of the Circuit Court of Appeals, to review which this writ of error was sued out, is not such a final judgment as this court can review on error.

The defects are alleged to consist in the facts, that, (*a*) it does not adjudge any particular or specific sum of money, which the defendants in error shall recover from the plaintiff in error, but simply affirms the judgment of the court below, and condemns the plaintiff in error and the sureties on its writ of error bond, to pay the costs of that court; (*b*) it does not authorize nor direct the trial court to issue execution on its own judgment, for principal nor interest, nor for any specified sum; and (*c*), it does not finally dispose of all the parties to the case in the Circuit Court of Appeals, in that no judgment is rendered, either in favor of or against, the sureties on the writ of error bond, except for the costs of the Circuit Court of Appeals. (Rec. p. 85.)

It is believed to be the settled rule of this court, that in appeals or writs of error from an intermediate appellate court, the action of the trial court cannot be reviewd upon a point which was not passed upon by the intermediate appellate court, but that the review in this court must be confined to the action or proceedings of the latter.

Zeckendorf vs. Johnson, 123 U. S., 617;
San Pedro &c. Co. vs. United States, 146 U. S., 120.

This seems to be the rule of this court, whether the appeal or writ of error is prosecuted from the supreme court of a state or of a territory.

In a writ of error from the supreme court of a state, this court said: "We act only upon the judgment of the supreme court. Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings, can be considered by us upon error."

Fashnacht vs. Frank, 23 Wall, 416;
Penn. Co. vs. Bender, 148 U. S., 502.

In another case this court held, that it would not accept and consider an assignment of the errors in a district court of a territory on appeal to the supreme court of the terri-

tory, but that there must be, on appeal to this court, an assignment of the errors in the judgment and proceedings of the supreme court of the territory.

Benites vs. Hampton, 123 U. S., 519.

From these decisions, it seems that this court considers that its appellate jurisdiction, in this class of cases, is invoked to review the judgment of the intermediate appellate court, and not that of the trial court.

The petition for the writ of error in this case, and the writ itself, as well as the assignment of errors, show that the complaint is of error in the judgment of the intermediate appellate tribunal, the Circuit Court of Appeals, and not of any error in the proceedings of the trial court. And it is doubtful, to say the least, whether this court could entertain an assignment of the errors in the proceedings of the Circuit Court in a case carried to it through the Circuit Court of Appeals; for it seems to have been the intention of Congress, in passing the act of March 3, 1891, to confine the jurisdiction of this court in cases like the present, to a review of the judgment and proceedings of the Circuit Court of Appeals, and not to extend it to those of the Circuit Court. This intention is evidenced by the provision in section five of that act, which gives this court jurisdiction to review directly, the judgments of the Circuit Courts in six enumerated classes of cases. The conclusion is very strong, that Congress, by that enumeration, did not intend that this court should have jurisdiction to review any of the judgments of the Circuit Courts, except in the class of cases mentioned in the statute. The ancient maxim, "*expressio unius est exclusio alterius,*" forbids any other construction.

It is submitted, therefore, that the following propositions and authorities sustain all the points raised herein; that the judgment of the Circuit Court of Appeals is not such a final judgment as this court can review on writ of error.

(*a*). A decree or judgment of affirmance, without specifying the sum for which it is rendered, is not a final decree or judgment, from which an appeal or writ of error will lie.

Montgomery vs. Anderson, 21 How., 386;
Wheeler vs. Harris, 13 Wall. 51;
The Lucile, 19 Wall, 73;
Mordecai vs. Lindsay, 19 How., 199

A judgment for costs alone, is not a final judgment from which an appeal or writ of error will lie.

Figures vs. Dunklin, 68 Tex., 644;
Scott vs. Burton, 6 Tex., 322;
Warren vs. Shuman, 5 Tex., 450.

(*b*). A final judgment, from which a writ of error will lie, must be one which authorizes the issuance of execution to enforce it, either by the court which renders it, or by the court which is authorized by the statute to issue the execution.

Sec. 10, act March 3, 1891;
Pickett vs. Legerwood, 7 Pet., 144;
Wilson vs. Daniel, 3 Dall., 401;
Fitzgerald vs. Evans, 53 Tex., 461.

A final judgment should contain:

1st. The facts judicially ascertained, with the manner of ascertaining them entered of record.

2nd. The recorded declaration of the court pronouncing the legal consequences of the facts thus judicially ascertained.

Fitzgerald vs. Evans, 53 Tex., 461;
Eastham vs. Sallis, 60 Tex., 576.

(*c*). A judgment is not final if it fails to dispose of the case as to one or more of the parties to it.

Int. & G. N R. R. Co. vs. Smith Co., 58 Tex., 74;
Whittaker vs. Gee, 61 Tex., 217;
Simpson vs. Bennett, 42 Tex., 241.

Proceedings in error are in the nature of a new action, brought by the party against whom final judgment has been rendered in the trial court, whether plaintiff or defendant. It is brought on some alleged error in such judgment and proceedings, and the person by whom this new action in error is brought is called the plaintiff in error, and the opposite party is called the defendant in error. Frequently they are the same parties, and as they stood in the court below; but often they are reversed. Frequently the case in error is brought by some new party; but at all times he must be one of the parties to the judgment, or a personal representative, or privy in estate, or interested in the subject matter, *or bail*, and the like cases of privity in interest.

Powell on Appellate Proceedings, p. 105, sec. 7; Ibid, p. 116, sec 3; Ibid, p. 262, sec. 1; Ibid, p. 267, sec. 9.

And in this new action in error it must be affirmatively shown by the plaintiff in error, that there is error in the judgment or proceedings of the court below, which the writ is issued to revise; the error alleged must be made out clearly and satisfactorily, and can never be presumed. Every reasonable intendment is in favor of the correctness of the judgment of the court below.

Brechtel vs. United States, 10 Otto, 597;
Ventrees vs. Smith, 10 Pet., 161.

And if the plaintiff in error fails to show error, he fails to make good his plea, according to the conditions of his bond, and judgment should be given, as matter of course, against both the principal and his bail. By volunteering to make themselves parties to the case, and signing the writ of error bond, the sureties enable their principal to supersede the judgment for an indefinite time. They voluntarily bind themselves, jointly and severally with their principal, to pay the judgment of the court below, in case the principal fails to show that there was error in it. The failure of the Circuit Court of Appeals to reverse that judgment, was a failure of the principal to show error in it; and by every principle of reason and justice, the defendants in error were entitled to a judgment giving them the benefit of the additional security, to protect them against the hazard of delay. The affirmance of the judgment of the Circuit Court was not a judgment against the sureties, because they were not parties to the action when the judgment was rendered by the Circuit Court, and the judgment of the Circuit Court of Appeals makes no disposition of the case as to them, although they were parties to the proceeding in that court.

The rule as to final judgments was applied to cases carried by appeals or writs of error from the District to the Circuit Courts, while the latter had appellate jurisdiction over the judgments of the former; as well as to cases carried by appeals and writs of error from the Circuit Courts to the Supreme Court; and no reason whatever can be perceived, why it should not apply to cases removed by appeals and writs of error from the Circuit Court of Appeals to this Court.

The Lucile, 19 Wall. 73;
Mordecai v. Lindsay, 19 How. 199;
Wheeler v. Harris, 8 Blatch. 81.

Wherefore, it is respectfully submitted that the writ of error in this case should be dismissed.

III.

The third ground of the motion to dismiss, presents the question that the writ of error issued in this cause and found in the record, is insufficient to give this court jurisdiction, because all the defendants in error are not named therein, but are designated as "May Gentry and others;" from which it appears that there are parties to the cause who are not made parties to the writ of error. (Rec. p. 95.)

The Protector, 11 Wall. 82;
Miller v. McKenzie, 10 Id. 582.

It is conceded that this is a defect which may be amended under section 1005, of the Revised Statutes of the United States, upon proper application; but it is within the discretion of the court to allow such amendment; and the leave will not be granted when the record shows that the questions presented for review, are only such as have been settled by the decisions of this court, adversely to the plaintiff in error. And while the defect is one which may be amended on motion, still a motion to dismiss, based on such defect, gives such color of a right to dismiss, as will authorize the court to look into and examine the record, with a view to an affirmance on a motion to affirm united with a motion to dismiss.

Pearson v. Yewdall, 95 U. S. 294;
Moore v. Simonds, 100 U. S. 145;
Zeckendorf v. Johnson, 123 U. S. 617.

Wherefore, the defendants in error submit, that their motion to dismiss should be granted; but if the court should conclude that it ought to be denied, either in whole or in part, then they request the court to look into the record while investigating the different grounds for dismissal presented in their motion to dismiss, and it is believed that the only questions of law presented there will be found to be well settled adversely to the plaintiff in error, and they ask that their motion to affirm be considered in connection with their motion to dismiss, and if the latter should be denied, that the former be granted.

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Attorneys for Defendants in Error.

No. 15,369.

THE TEXAS & PACIFIC RAILWAY CO., Plaintiff in Error,

vs.

MAY GENTRY ET ALS., Defendants in Error.

ERROR TO THE U. S. CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF IN SUPPORT OF MOTION TO AFFIRM.

Statement of the Nature and Result of the Action.

This action was brought in the District Court of Dallas County, Texas, November 11, 1890, by the defendants in error against the plaintiff in error, to recover damages for negligently causing the death of Louis D. Gentry. Deceased was the husband of May Gentry, the father of Olive Lee and Thomas M. Gentry, and the son of Mary A. Gentry, all defendants in error. On January 12, 1891, the plaintiff in error removed the cause to the United States Circuit Court for the Northern District of Texas, at Dallas, on the ground that, "this suit and its defense thereto is one arising under the laws of the United States, in this, to-wit." the acts of Congress granting a charter to the Texas and Pacific railway company. (Rec. pp. 6 to 9.)

The cause came on for trial before said Circuit Court for the third and last time, January 31, 1893, when a verdict was again returned in favor of the defendants in error, this time for the total sum of $10,166.66, and by the jury apportioned among them as follows: May Gentry, $4,166.66, Olive Lee and Thomas M. Gentry, $2,500.00 each, and Mary A. Gentry, $1,000.00.

Separate and distinct judgments were entered by the Court, in favor of each plaintiff, in accordance with the verdict, and executions were ordered to issue on each judgment separately. (Rec. pp. 12 and 13.)

The plaintiff in error sued out a writ of error from the United States Circuit Court of Appeals for the Fifth Circuit, and on June 27, 1893, judgment was entered in said Circuit Court of Appeals, affirming the judgment of the Circuit Court; but without specifying any sum of money which the defendants in error should recover from the plaintiff in error; without rendering any judgment against the sureties on the writ of error bond for the amount of the judgment of the Circuit Court; without ordering any mandate to issue, and without authorizing the Circuit Court to issue executions, except for the costs of the Circuit Court of Appeals. (Rec. p. 85.)

The assignment of errors relied on in this court are the same that were relied on in the Circuit Court of Appeals, and will now be considered *seriatim*, for the purpose of showing that every question raised in the record is well settled adversely to the plaintiff in error, and that this writ of error was sued out for delay only.

First Assignment of Error.

This assignment calls in question the refusal of the trial court to give a peremptory instruction to the jury to return a verdict for the defendant, because the plaintiffs had failed to prove their case, and shown no right to recover. The assignment shows the defendant's theory of the case, and its contention at the trial, and is therefore given in full, as follows: (Rec. p. 86.)

"The Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to-wit:

'You are instructed that plaintiffs in this case have failed to prove their case, and have shown no right to recover; you are therefore instructed to find for the defendant.'

'Because plaintiffs sue for the death of L. D. Gentry, an employee of defendant (locomotive engineer) residing at Big Springs, Texas, on account of his being run over and killed by a road engine and flat car being used for switching purposes at night, with a headlight burning on the engine, and without a light or lights on the far end of the flat car from the engine to warn employees passing through the yard, the said engine and flat car being used in defend-

ant's yard at Big Springs, Texas, instead of a regular switch engine; for the reason all the evidence introduced upon the trial, (1) fail to show that he was killed by said engine and flat car; (2) and does show that if he was killed by the same, that it was by reason of said L. D. Gentry's carelessness in stepping on defendant's track in front of the same, when, if he had looked, he could have seen the same and avoided the accident. (3) And further shows that defendant's regular switch engine was temporarily disabled and was in the shop at Big Springs being repaired; that under such circumstances it was proper and customary, as was known to said L. D. Gentry, or by the exercise of ordinary care could have been known to him, for defendant to use for switching purposes said engine and flat car. (4) And that if the accident resulting in the death of said L. D. Gentry was caused from the fact that there was not a light or lights on the flat car at the time it is claimed L. D. Gentry was killed by the engine and flat car, that it was the duty of the employees operating said engine and flat car to have had a light or lights on the flat car, and that such employees were fellow-servants of said L. D. Gentry, and that on account of any negligence on their part in failing to light said car, defendant is not liable. The evidence wholly fails to establish any liability whatever on the part of the defendant for and on account of the death of said L. D. Gentry, and the jury should have been instructed to find a verdict for the defendant." (Rec. p 86.)

A.

The record shows that this request was not made when the plaintiffs had closed their testimony, but after the close of all the evidence; after the defendant had introduced testimony in its own behalf, and had submitted the issues involved to the jury. (Rec. pp. 62 to 65.)

It is well settled by the decisions of this court, that this assignment cannot avail the plaintiff in error, because its failure to request the peremptory instruction at the close of the plaintiff's testimony, and to stand on that alone, and going to the jury on the issues and introducing testimony in its own behalf, is a waiver of the error, if there was any.

Robertson v. Perkins, 129 U. S. 233;
Bogk v. Gassert, 149 U. S. 23;

Ins. Co. v. Crandall, 120 U. S. 527;
Northern Pac. R. Co. v. Mares, 123 U. S. 710;
Hunt Bros. Fruit Packing Co. v. Cassidy, 3 Cir. Ct. App. R. 528.

In the cases of Park v. Ross, 11 How. 362, and Pleasants v. Fant, 22 Wall. 123, this court said that the practice of instructing the jury to find for the defendant, has superceded the ancient practice of demurrer to the evidence, and it answers the same purpose, and should be tested by the same rules. Then when we apply the rules which governed the ancient practice of demurrer to evidence, to the modern practice of requesting a peremptory instruction to find for the defendant, we see that it was ever held that a party might waive his legal right by positive act, or lose it by neglect. Instances of the first are given as where he pleads over, or withdraws a demurrer; of the second, as where he fails to present his demurrer, or resorts to another issue.

Powell on Appellate Proceedings, p. 192, sec. 115.

The rule is universal, that if a defendant fails to call his demurrer to the plaintiff's pleadings to the attention of the court, and demand a ruling on it, and goes to trial upon the issues of fact, he is considered to have waived his demurrer, and cannot insist upon it at a subsequent stage of the trial. The rule was equally applicable to the ancient practice of demurrer to the evidence, and should be applied to the modern practice of peremptory instructions.

Stephen on Pleading, p. 90.

It seems to have been the ancient practice, that when a defendant presented his demurrer to the plaintiff's evidence, at the close of the plaintiff's testimony, and it was overruled by the court, he might then and there take an exception to the ruling of the court and retain the question in the record, and proceed with the trial, introducing testimony in his own behalf, without waiving the exception to the overruling of his demurrer to the evidence.

Powell on Appellate Proceedings, p. 193, sec. 115.

But some authorities hold, that if a defendant request a peremptory instruction to find in his favor at the close of the plaintiff's testimony, which is refused, and he excepts, and he fails to stand on that exception, but goes to the jury on the issues of fact, and introduces testimony in his own behalf, he thereby waives the exception.

Hudson v. Charleston, C. & C. R. Co., 55 Fed. R. pp. 252-257;
Grand Trunk Ry Co. v. Cummings, 106 U. S. 700.

It is immaterial, however, to the disposition of the case at bar, which view of the matter this court may now take, for the record shows that the plaintiff in error did not prefer its request for a peremptory instruction at the close of the evidence for defendants in error, and therefore the question which presents the distinction does not arise; but by all the authorities, ancient and modern, it must be held to have waived its right to demand a peremptory instruction, by not making the request at the close of the plaintiff's testimony, and excepting to the refusal of the court to give the instruction; and for this reason there was no error in refusing to give said instruction.

B.

The record also shows that this peremptory instruction requested by the plaintiff in error, was the last of a series of six special instructions requested by it in writing, at the close of the trial of the whole case, after all the testimony for both sides had been introduced. Each one of them was not called to the attention of the court separately, and requested to be given and refused by the court *seriatim*; but they were all requested to be given as a whole, and the court passed upon and refused to give them as a whole. (Rec. pp. 62 to 65.)

Such refusal is not error, unless all of them were proper and should have been given. It is not sufficient if some of them may have been proper and ought to have been given, but all of them must have been free from any objection. For this reason the court did not err in refusing to give said instruction.

Union Ins. Co. v. Smith, 124 U. S. 405;
Moulor v. Am. Life Ins. Co., 111 U. S. 335;
Hudson v. Charleston, C & C. R. Co., 55 Fed. R. 258.

C.

Even if the plaintiff in error could avail itself of this assignment of error, on the refusal of the trial court to give the peremptory instruction to return a verdict in its favor at the close of all the testimony, and if such special in-

struction had been preferred as a distinct proposition from the others requested; still there was no error in such refusal, because the request for such special instruction being equivalent to a demurrer to the evidence, it admitted, not only the facts stated in the testimony, but also every conclusion which the jury might fairly or reasonably infer therefrom; and the evidence of the liability of the company for the death of the deceased is ample, and well supports the verdict of the jury. In view of all the testimony, and of the inferences which may be drawn from it, the court did right in submitting it to the jury.

Parks v. Ross, 11 How. 373.

The principle which has ever guided this court in cases of this kind, is the just one, that where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this, whether the uncertainty arises from a conflict in the testimony, or because of the facts being undisputed, fair-minded men may honestly draw different conclusions from them.

Richmond & Danville R. Co. v. Powers, 149 U. S. 43.

And as was again said, whether the facts be disputed or undisputed, if different minds might honestly draw different conclusions from them, the case should properly be left to the jury; and in order to authorize the withdrawal of such a case from the jury, the facts should not only be undisputed, but the inferences in respect of the defendant's failure of duty which arise upon those facts, should be indisputable.

Railway Co. v. Stout, 17 Wall. 657.

And in still another case, it was held that a demurrer to the evidence will be overruled, if the jury could have found a verdict against the party demurring, though the court would be better satisfied with a verdict in his favor.

Pawling v. United States, 4 Cranch, 219.

It is sometimes a difficult question to determine, when the Judge ought to take a case involving questions of negligence from the jury, and tell them that the testimony does, or does not, show negligence; but the attention of the court is invited to an investigation of the rule adopted in Pennsylvania, which is believed to be sound, just and reasonable, and to go a long ways towards furnishing a safe

guide in solving the difficulty in every conceivable variety of case that can arise in any court.

In a case in the Supreme Court of that State, Judge Sharswood said:

"It is said that the facts were undisputed, and that upon the undisputed facts negligence was a question of law. There is no such principle, except where a man violates a plain legal duty. 'There are, it is true,' said Mr. Justice Strong, 'some cases in which a court can determine what omissions constitute negligence. They are those in which the precise measure of duty is determinate, the same under all circumstances.' When the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court. But where the measure of duty is not unvarying; where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved."

Penn. Canal Co. v. Bently, 66 Pa. St., 34.

In another case it is said:

"Whether the defendants had been guilty of the negligence charged, was therefore the principal subject of inquiry; in other words, whether they had exercised such care and diligence to prevent injury, as a prudent and reasonable person, under the circumstances, would exercise. Now it is plain, that what is such a measure of care, is a question peculiarly for a jury. A higher degree of care is doubtless demanded under some circumstances than under others. It varies with the danger. And when the standard shifts with the circumstances of the case, it is in its very nature, incapable of being determined as matter of law, and must be submitted to the jury. There are, it is true, some cases in which a court can determine what omissions constitute negligence. There are those in which the precise measure of duty is determinate, the same under all circumstances; when the duty is defined, a failure to perform it is of course negligence, and may be so declared by the court. But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others, where both the duty and the extent of its performance are to be ascertained as facts, a jury alone can determine what is negligence, and whether it has been proved. The question is, not alone what the defendant had done, or left undone, but in addition, what a prudent and reasonable man would ordinarily have done under the circumstances. Neither of these questions could the court solve."

McCully vs. Clark et al., 40 Pa. St., 399.

In discussing the question of contributory negligence in another case, it is said:

"The law is well settled, that what is and what is not negligence in a particular case, is generally a question for the jury, and not for the court. It is always a question for the jury when the measure of duty is ordinary and reasonable care. In such cases, the standard of duty is not fixed, but variable. Under some circumstances a higher degree

of care is demanded than under others. And when the standard shifts with the circumstances of the case, it is in its very nature incapable of being determined as matter of law, and must be submitted to the jury to determine what it is, and whether it has been complied with. But when the standard is fixed, when the measure of duty is defined by the law, and is the same under all circumstancess, its omission is negligence, and may be so declared by the court. And so, when there is such an obvious disregard of duty and safety as amounts to misconduct, the court may declare it to be negligence as matter of law But where the measure of duty is not unvarying, where a higher degree of care is demanded under some circumstances than under others; where both the duty and the extent of its performance are to be ascertained as facts, the jury alone can determine what is negligence, and whether it has been proved."

West Chester & Phil. R. Co. v. McElwee, 67 Pa. St. 315.

See the following cases on the same subject:

Penn. R. Co. v. Barnett, 59 Pa. St. 264;
Crissey v. Hestonville, etc. R. Co., 75 Id. 86;
Phil. City Pass. Ry. Co. v. Hassard, 75 Id. 376.

These principles are of easy application to the evidence in this case, and clearly show that the question of negligence, either by the railway company or by the decedent, was one of fact for the jury, and not of law for the court. The evidence does not show that either omitted any duty defined or prescribed by law; nor does it show any such obvious disregard of duty on the part of either, as to shock the ordinary sense of prudence, and make it incumbent on the court to declare it to be negligence as matter of law. The only standard or measure of duty as to both the company and the deceased, was ordinary care; and what that was under the circumstances, and whether either or both of them complied with it, could only be determined by the jury as matters of fact. When, therefore, the court was asked to instruct the jury to find for the defendant, because the evidence failed to show negligence on its part, the instruction was properly refused. It could not have been given without determining as matter of law, what care and caution a man of ordinary and reasonable prudence would have exercised in circumstances similar to those developed by the testimony. The same would have been true, had the plaintiffs asked the court to instruct the jury to return a verdict in their favor, because the evidence showed that the defendant was guilty of negligence, and only have left to the jury the amount of damages to be assessed. The same rule also applies to the question of contributory neg-

ligence on the part of the deceased. The question of negligence all round was, therefore, properly submitted to the jury.

The duty of the master in furnishing machinery or appliances, is measured by the same rule of ordinary care, as in other matters. He is not bound to furnish the best known or conceivable, but is simply required to furnish such as a reasonable and prudent man would furnish if his own life were exposed to the danger that would be likely to result from the use of unsuitable or unsafe appliances or machinery, in the given case.

Whittaker's Smith on Negligence, p. 126.

And what appliance for switching purposes, a reasonable and prudent man would have been likely to furnish under the circumstances developed by the testimony, were his own life exposed to the danger arising from its use, was a question peculiarly for the jury to ascertain, and not for the court.

In the cases of Wabash Ry. Co. v. McDaniels, 107 U.S. 454, Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, and Richmond & Danville R. Co. v. Powers, 149 U. S. 43, this court has substantially adopted the principles of the Pennsylvania rule above quoted, without, however, stating it in exactly the same language, or referring to its source; but the coincidence serves to show that the principles of justice pervading the minds of different men, run in parallel channels.

Looking at the issues before the jury, and the testimony as a whole, it is clear that the trial judge was correct in refusing to take the case from the jury, and hold as matter of law, that plaintiffs were not entitled to recover on the whole of the testimony, and in view of every fair and reasonable conclusion which the jury, as fair-minded men, might honestly draw therefrom, relative to both the failure of duty on the part of the defendant, and contributory negligence on the part of the deceased.

The plaintiffs in the trial court, contended that the defendant was liable for Gentry's death, because:

1. It had failed to make and enforce necessary rules and regulations concerning the conduct of its business, in and about its yard, in the running of switch engines with flat cars in front of them, that were required for the protection of its employes whose duties called them to pass

across the yard on dark nights, such as having a watchman or switchman on the flat cars, or putting lanterns on them;

2. That the company was guilty of negligence in the use of the road engine and coal car as a switching appliance, it being an unwieldy machine and not so well adapted to that purpose as a regular switch engine, without taking some precautions to notify those employes of the change, who did not work in the yard, nor with that engine, but whose duties required them to pass across the yard in going to or returning from their respective labors; and,

3. That the company was guilty of negligence in the use of that road engine and coal car for switching purposes, in that the engine itself, was defectively constructed for that purpose, because the headlight was so arranged or constructed, that the rays of light therefrom were not reflected down in front of the engine, so as to light up surrounding objects in the immediate neighborhood, and fall clearly on the flat car and indicate its location to employes; but was raised up high, so as to throw the rays of light far down the track when on the road, passing entirely over, or nearly over, the flat car, and thus leaving it in total or partial darkness and obscurity.

The defendant relied, (1), on the general denial, (2), that the deceased, L. D. Gentry, was guilty of contributory negligence in stepping upon the track in front of the engine and car, without looking, or taking the necessary precautions for his own safety, and, (3), that the injury was the result of the negligence of the fellow-servants of deceased.

The charge of the court eliminated from the case, the first point contended for by the plaintiffs, by charging the jury, that if deceased lost his life by the failure to have lanterns placed on the flat car, that the company would not be liable, because it was the duty of the yard men to place them there, and they were the fellow-servants of the deceased; but submitted the case to the jury on the second and third propositions contended for by the plaintiffs, and the defendant's general denial and plea of contributory negligence. (Rec. pp. 65 and 66.).

No human eye saw the deceased as he went down before the car, but there is no dispute about any of the facts. Any uncertainty about any question presented to the jury, arose, not so much from any conflict in the testimony, as from the

different inferences and conclusions which might be honestly drawn from it as a whole by different men.

On the trial in the Circuit Court, the uncontradicted facts were shown as alleged, that L. D. Gentry, deceased, was in the employ of the plaintiff in error as passenger locomotive engineer, and ran its regular passenger train between Big Springs and Toyah. That his train left Big Springs every other night at 9:25 o'clock and returned every other morning at 6:52 o'clock. That he spent every other day in Big Springs, and the alternate days in Toyah. That his family resided in Big Springs, on the south side of the railroad track, and there was a regular beaten path through the western part of the railroad yards from south to north, passing under the coal chutes, which had been used by deceased and all the other employes of the company for a number of years, in going to and returning from their labors; that such use was well known to the officials of the company, and none of them had ever objected to, or forbidden it. That this path was the most direct and convenient route for deceased to travel, in going from his locomotive to his residence when quitting work, and in going from his residence to his locomotive when about to resume his labors; that his invariable custom was to use this path at such times.

That on the night of March 13, 1890, deceased left his residence at about 8:00 o'clock, to go to his engine, which was standing on the round house switch, on the north side of the main track, in charge of the fireman; and nearly opposite the point where the above described path intersected the main track. That the night was a very dark one; that some time between the hours of 8:30 and 9:00 o'clock, his dead body, very much mangled and torn, and having all the appearance of having been run over by a railroad car or engine, but not yet cold in death, was found lying on the north rail of the main track, about fifteen feet west from the point where the aforesaid path intersected the main track; and the coal slack on the main track between the points where the path intersected it and where the body was found, had the appearance of having been dragged over by a body; and a quantity of fresh blood and some particles of flesh, were found adhering to the north rail of the main track; between the same points. That a fresh boot track, very much resembling, and supposed to be that of deceased, was found on the south side of the dump of the main track, just where the path intersects it.

It is also shown that Big Springs is the headquarters of the Rio Grande division of the railroad; that crews are changed and trains made up there; and that the division officers and a great many employes of the road reside there.

The uncontradicted evidence also shows that on the night Gentry was killed, a large road engine, No. 68, with a coal car coupled in front of it, was being used in the yards there for ordinary switching purposes; and that this road engine and flat car, ran down into the western part of the yard where Gentry's dead body was found, between 8:15 and 9 o'clock that night, and that no other train, engine or car was in that part of the yard during that time. That an examination of said engine and flat car, soon after the body was found, showed fresh blood, flesh and human hair adhering to the north trucks of the flat car, and to the front truck of the engine on the north side, and on the bars of the pilot, or cow-catcher, in front of the engine.

It also appears that this flat car was coupled in front of the engine by order of the chief train dispatcher, for the convenience and safety of the switchmen working with said engine; and was being used in the place of the regular switch engine, which was in the round house for repairs. That there were no lights on said flat car, to indicate its position, nor was there any switchman or watchman on it, to notify employes of its approach; and that no rules or regulations had been adopted and enforced in the yard at Big Springs, in March, 1890, requiring lanterns to be placed on flat cars in front of road engines moving through the yard, in order to give warning to employes and others, as to where and when the car was moving, nor any other precautions taken for the safety of such employes. (Douglas' testimony, Rec p. 49.)

Ten or fifteen witnesses, all acquainted with this particular engine and car, testified that it was much more dangerous to other employes whose duties required them to pass about or across the yard at night, than a regular switch engine. Descriptions of the two were given and explained to the jury, and the reasons of the witnesses were given, showing why the former was more dangerous than the latter. Several witnesses who had never seen this particular engine and car, officials of other railroads, testified for defendant, that a road engine with a flat car coupled

in front of it for switching purposes, was not any more dangerous to the switchmen who *worked with it*, than a regular switch engine; but there was no conflict in the testimony that it was much more dangerous to those employes who did not work with it, but whose duties required them to pass across the tracks in the yard.

There was evidence tending to show that the headlight on this engine did not throw any light at all, on the flat car in front of it, (T. A. Gentry's testimony, Rec. p. 43); and some witnesses testified that such light fell on the far end of the car; some of them testified that as much as from one-fourth to three-fifths of it was in the light.

The testimony of one witness, Walter Winters, a locomotive engineer, was uncontradicted, that there are two kinds of headlights in use on railroads; one that stands up high, with the reflector elevated so as to throw the rays of light far down the track, which are used on regular road engines; and another kind which are inclined forward, with the reflector tilted downward so as to throw the rays of light on the ground near by, and directly in front of the engine, which are used on regular switch engines in the yards. He also testified that the headlight on road engine No. 68, the night Gentry was killed, was ot the former kind, and that the reflector was quite dirty. (Rec. p. 46 and 48.)

One witness, Jake Mittel, the fireman on engine No. 68, says, that the last trip that engine 68 made in the western part of the yards that night, was about 8:30 o'clock, and when the engine approached the path along which Gentry usually traveled, it was "slowing up," and had almost come to a stand-still; that the lever had been reversed and the engine was making a great deal of noise. (Rec. p. 22.) The engineer on engine 68 testified that the engine went about fifteen feet west of that path, the last trip it made that night in that part of the yard. (Rec. p. 24.)

Another witness, A. B. Perkins, testified that only three or four nights before Gentry's death, he himself encountered this same road engine and coal car, at the same place where Gentry lost his life; that he was going across the main track on the path that Gentry usually traveled, when this same engine came along backing to the east; that he did not know that any coal car was coupled in front of it, and when the engine had passed the point where he was standing waiting for it to pass, he moved forward to go across the track, and the side of the coal car following along

in the dark after the engine, struck him about the breast and knocked him down beside the track, and came near killing him. He says that he never saw the car until it struck him, and did not know it was there, although the headlight was burning brightly; that the headlight blinded his eyes, and did not shine on the flat car sufficiently for him to see it. (Rec. pp. 32 to 34.)

R. J. Thompson, the night yard master, also had the same experience a few nights before, by walking up against the end of this same car, while it was standing still, coupled in front of this same engine, and the headlight burning brightly over the car He says that the headlight blinded him, was the reason why he did not see the flat car. (Rec. p. 30.) On cross-examination this witness admitted that his runnng against the flat car was owing to his own carelessness; that if he had looked close he could have seen it. But it does not necessarily follow, that because Thompson was guilty of negligence, that Perkins and Gentry were also in not seeing the coal car. Thompson being night yard master, his duties required him to know all about everything that was in the yard; this engine and car were under his control; but Perkins being an engineer on a freight train, and Gentry on a passenger train, both running on the road exclusively, are not to be charged with a knowledge of the use of the road engine and flat car, as Thompson was

Several witnesses testified, that a short time after Gentry's death, within two hours afterwards, they went to the point where he lost his life, and placed themselves beside the track in the same position which he must have occupied just prior to being struck by the car, and this same engine and flat car came by them. They all agree that it was with great difficulty that they could see the flat car at all. That they just could distinguish it, but then, that they were there for that express purpose, and were looking closely for it. That an unsuspecting person would not have seen it. The testimony is uniform, that the flat car could be seen more easily by a person *behind* the headlight, than by one in front of, and to one side of it; and that a person beside the track in front of the headlight could not easily see the flat car.

It is but just and fair to class the deceased as an unsuspecting person. He was not employed in the yard, but his

duties were exclusively on the road. Whether he was chargeable with notice of the use of the road engine and flat car for switching purposes, was a proper question for the jury. He had a right to presume that the company would furnish safe and suitable appliances for this work. He knew that a regular switch engine was such a suitable appliance, and was so used. He knew that if the engine before him, when he reached the track, was the regular switch engine, that there was no flat car coupled in front of it, and that he had ample time to cross the track in front of the slowly moving engine, without any danger. If he was misled, it was the fault of the company. (Beach on Contributory Negligence, p. 71, sec, 23.) If the emergency arose which justified the company in using this road engine and flat car in the place of the disabled switch engine, it was its bounden duty to adopt such precautions as would have given notice to its employes who were not working with it, and whose duties required them to cross the yard, of the increased danger and peril incident to the use of the more cumbersome, unwieldy and dangerous appliance.

The plaintiffs asked the jury to draw from all the testimony, the conclusion that Gentry was on his way to take charge of his engine, going along his accustomed route under the coal chutes, when he saw an engine approaching slowly from the east. It was about to stop, and being a skilled engineer, he recognized the noise made by the engine when the lever was reversed, and knew that it would stop still before, or by the time it reached the point opposite to him. It must then have been from forty to fifty feet from him, judging from the length of the flat car, and he had ample time to cross the track in front of it, before it could possibly reach his point of crossing. The headlight had a blinding effect upon his eyes, the noise made by the escaping steam incident to the reversal of the lever, attracted his attention particularly to the engine, and fixed in his mind that it was on the point of stopping. He was watching the engine and did not know the flat car was there. With these false appearances surrounding him, he did not perceive the insidious, treacherous and dangerous coal car, that was noiselessly gliding along in the darkness in front of the engine, without any lanterns on it, without any switchman on it, the rays of the headlight passing entirely, or nearly so, above and beyond it; and if having any influence on the scene at all, adding greatly to the difficulty

of seeing the coal car by blinding the eyes. With these appearances, and with these impressions on his mind, he moves forward, as the witness Perkins says he did, and instead of being struck by the side of the flat car and knocked down beside the track as Perkins was, the car was moving in the opposite direction, and Gentry was struck by the end of the car after he had got upon the track, was knocked down and run over before he could recover from the surprise and shock of being struck by the car. and his body dragged some fifteen feet westward to where it was found. That taking into consideration the surrounding circumstances, the character of the deceased as proved, and the natural disposition of men to take care of themselves and avoid danger, it must be presumed, in the absence of proof to the contrary, that the deceased was not wanting in the exercise of that care and caution, which such a man as he was, would ordinarily have taken. That if the engine had been the regular switch engine, without the dangerous flat car in front of it, or even if there had been no flat car in front of the road engine, but the pilot taken off so that it could be safely and conveniently used as a switch engine, he would have had ample time to cross the track in front of it, as he doubtless calculated that he would have. That if the headlight on the engine had been so arranged as to deflect the rays of light down on the ground in front of, and near to the engine, as is done in regular switch engines, there would probably have been sufficient light thrown upon the flat car, to have made it visible to one standing beside the track in front of the engine, as Gentry was, and he could have seen the flat car in front of the engine, and avoided the danger. The testimony shows that all of these things would have conduced to the safety of those employes whose duties required them to cross the tracks, and been equally as safe and convenient for those working with the switching appliance. These were legitimate, fair and reasonable conclusions to ask the jury to draw from the testimony, and they were favorably responded to by the jury.

The defendant asked the jury to draw from all the testimony, the conclusion, that Gentry was guilty of contributory negligence in recklessly stepping upon the track in front of the approaching engine and flat car, knowing that both were there. That being in the full possession of the sense of seeing, it was his business to see the danger ahead

of him. That it was his duty to know that the road engine and flat car were being used for switching purposes, notwithstanding that he was not an employe in the yard, and was in Big Springs only every other day, and then very rarely went about the yard. There was no evidence whatever of Gentry's contributory negligence, but counsel for defendant urged the jury to infer from the facts in evidence, that he was contributorily negligent. Their contentions may or may not have been legitimate, fair and reasonable deductions for the jury to draw from the testimony, but they seem to have refused to take that view of the testimony, and having passed upon these questions, as it undoubtedly was their province to do, this court will not attempt to review their conclusions.

See 7th amendment to Constitution of the United States;
Hepburn v. Dubois, 12 Pet., 376.

It was also contended for the defendant, that it had a right to use any kind of switching appliance in its yard that it saw proper, and it was the duty of all employes in every branch of the service, and along the whole line of the road, to exercise diligence to ascertain what kind of appliance was being so used, and to look out for their own safety. That if the employes failed to do so, they were guilty of negligence and the company was not liable for any injury which might occur to them. If the company can escape liability in this case at all, it must be on this theory, that it has the absolute right of way over its tracks, in total disregard of the rights of every other person, and all others must look out for their own safety. But this inhuman doctrine cannot be sanctioned by any court, and has often been repudiated.

Hill v. Portland etc. R. Co., 55 Me. 438;
Int. & Gt. No. Ry. Co. v. Hinzie, 82 Tex. 625.

It was argued on behalf of the defendant in the court below, that it was no failure of duty on its part to use the coal car in front of the road engine as a switching appliance, and such practice was not negligence on its part, because it was customary for regular switch engines to push before them long trains of cars, both flat and box cars, and that the deceased being a railroad man, must have known of such custom; and therefore, the use of the coal car coupled in front of the road engine as a switching appli-

ance, was no greater act of negligence than the pushing through its yards by a regular switch engine, of long trains of such cars. That if the deceased had been on the look-out for the latter, as it was his duty to do, he would not have encountered and been run down by the coal car.

In reply to this, it was suggested that the uncontradicted testimony showed, that the headlight on engine No. 68 did not shine brightly close down in front of the engine, so as to illuminate clearly one flat car, but threw its rays of light far ahead, and illuminated objects at a distance more clearly; and the conclusion was natural, that if there had been a long train, or several of such cars in front of the engine instead of only one, they would have extended far enough away from the headlight to have been brilliantly lighted up by it, or the tall box cars, if any had been in front of the engine, would have been high enough to have been within the radius of the light, and the deceased would have been able, in either event, to see them and keep out of danger. Besides this, the evidence shows that when a switch engine is pushing a train of cars through the yards at night, it is customary to have a switchman with a lantern on the front car, and this would have indicated its position.

But the flat car which did the damage in this case, was not a car which was being switched in the yard for any purpose, but was a part and parcel of the machinery or appliance used for switching, especially for the convenience and safety of the employes who were working with it, in total disregard of the safety of other employes, who were not working with it, but whose duties were just as essential to the operation of the road, and whose rights to the use of the yard in going to or returning from their labors, were just as sacred, and entitled to just as much consideration and protection, as those of the employes who were working with the unsafe and unsuitable switching appliance The jury took this view of the matter, and the testimony justified them in doing so.

The burden of proof was upon the defendant to show the contributory negligence on the part of the deceased that would exonerate it from liability for his death, and it must have been proved by a preponderance of the evidence.

Hough v. Railway Co., 100 U. S. 213;
Northern Pac. Ry. Co. v. Mares, 123 U. S. 710;
Eddy v. Wallace, 1 Cir. Court Appeals, R. 440.

In jurisdictions where contributory negligence is held to be a matter of defence, as in the United States courts, the rule is, that after the plaintiff has shown that the defendant has been negligent, then the defendant has to show, first, that the deceased was negligent in respect of the matter complained of, and might have avoided the consequences of the defendant's negligence; and secondly, that the decedent's negligence was of such a character that the defendant could not have avoided its effects.

Whittaker's Smith on Negligence, pp. 381, 382, 383 and 384.

This author defines contributory negligence, in law, to be, "that sort of negligence on the part of a plaintiff (or decedent) which is the proximate and not the remote cause of the injury." Ibid, p. 373.

It is also there said:

"That the words 'proximate cause,' in this definition, must be taken to mean such a cause, that its effect could not have been counteracted or avoided by the ordinary care of the defendant. Thus, if the defendant could not by ordinary care, avoid the decedent's negligence, the decedent's negligence is the proximate cause of the injury. It is therefore, in law, that sort of negligence which, being a cause of the injury, is of such a character that the defendant could not have avoided the effects of it." Ibid, pp. 373-4.

This definition is illustrated by saying:

"When the plaintiff has proved, according to his evidence, that the act of the defendant has caused the injury of which he complains, the defendant in his turn may prove that the plaintiff, by his own act, contributed to cause the injury, and that the plaintiff might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence. But such proof is not in itself, sufficient to destroy the plaintiff's claim, and the defendant must go farther, and show that the plaintiff's negligence was of such a character, that the exercise of ordinary care upon the defendant's part, would not have prevented the plaintiff's negligent act from causing the injury, and this is the sort of negligence which the law calls 'contributory negligence.'"

Whittaker's Smith on Negligence, pp. 374, 5 and 6.

The principle above defined and illustrated, and as announced in Davies v. Mann, 10 Mees. & W. 546, was directly involved in two well considered cases in this court, and was approved in its entirety.

Inland & Seaboard Coasting Co. v Tolson, 139 U. S., 551;

Grand Trunk Ry. Co. v. Ives, 144 U. S., 429.

Applying this principle to the present case, it appears that the contention of those who speak for the plaintiff in error, that the deceased ought to have known of its custom to use in its yards at Big Springs for switching purposes, the road engine and flat car when the regular switch engine was disabled, because it was done so often that he must have seen it done, or if not, he had ample opportunity to have seen it done, and was therefore chargeable with knowledge of such use, is not of itself, sufficient in law, to relieve it from liability for its negligence in failing to furnish suitable appliances. Even if it were affirmatively shown that the deceased knew of this custom, this would not of itself, have exonerated the plaintiff in error from the consequences of its own negligence in the use of unsuitable appliances, unless it had further shown, that the deceased knew that that appliance was being used at the very time when he encountered it, and that he did not then exercise that degree of care in protecting himself against injury from it, which a reasonable and prudent man would have exercised under the same circumstances; and further, that no ordinary care upon its part, such as having a suitable headlight on the road engine, lanterns or a watchman on the flat car or taking off the pilot so that the road engine could have been used for switching purposes without the necessity of having to attach the dangerous flat car in front of it, would have avoided or prevented the consequences of the decedent's negligence in failing to exercise ordinary care to protect himself against the company's primary negligence.

Whittaker's Smith on Negligence, pp. 374, 375 and 976;

Grand Trunk Ry. Co. v. Ives, 144 U. S., 429;

Inland & Seaboard Coasting Co. v. Tolson, 139 U. S., 551.

Davies v. Mann, 10 Meeson & Welsby, 546.

There is no testimony in the record that Gentry was guilty of any act of negligence whatever. Counsel for the defendant insist, that contributory negligence on the part of the deceased must be presumed. This is not the law, but the contrary is. In the absence of proof that the deceased was guilty of contributory negligence, as in this case, the jury were authorized, as was said by this court in a well considered and humane decision, to infer the absence of any

fault on the part of the deceased, from the circumstances; and that the dispositions of men to take care of themselves and keep out of difficulty, may properly be taken into consideration by them.

Railway Co. v. Gladmon, 15 Wall., 401.

And the Maryland court has added, "the jury may also take into consideration the character and habits of the deceased, as proved on the trial."

Northern Cent. R. Co. v. State, 31 Md., 357;
Maryland Cent. R. Co. v. Neubeur, 62 Id., 402;
2 Thomp. on Neg., p. 1179.

And as was said by the Supreme Court of Texas, "the jury may apply the rule as to what, in their judgment, a man of ordinary prudence would have done under the attendant circumstances: that a sane man will not knowingly and recklessly expose himself to imminent bodily danger; that the instincts of self-preservation existed."

Mo. Pac. Ry. Co. v. Lee, 70 Tex., 501.

To the same effect are the following authorities:

Johnson v. Hudson River R. Co., 20 N. Y., 65;
Gay v. Winter, 34 Cal., 153.

The uncontradicted testimony of all the witnesses, was to the effect that the deceased was sober, careful and prudent; that he was, in fact, a most exemplary man, and one of the most efficient locomotive engineers in the service of the company, and that he had served it faithfully in that capacity for ten years prior to his death.

The jury were not unmindful of the dilemma in which counsel for the defendant in the court below placed themselves, by attempting to show, on the one hand, that one switch engine was amply sufficient to do all the work that was required by the business in the yard at Big Springs, and that the road engine and flat car was only used temporarily as a substitute for the switch engine while it was disabled, and thus refute the imputation that it was remiss in its duty to supply safe and suitable appliances for switching purposes in sufficient quantity; and on the other hand, to bring home to the deceased a knowledge of the use of this road engine and flat car, in aid of their defense of contributory negligence. In their zeal to establish the latter, they would lose sight of the former, and urge that the tem-

porary appliance was used so continuously, as to leave the impression that the regular switch engine could have been used very little of the time. In one breath they excused themselves on the ground that one switch engine was amply sufficient, and the road engine and flat car were only used occasionally when the switch engine was temporarily disabled, and in the next it was contended that the deceased must have known of the use of the road engine and flat car, because it was so used almost every day and night, and so continuously, that it seems impossible that he could not have known of it. It was a veritable sail between Scylla and Charybdis, and the traditional shipwreck was the inevitable consequence. They carried each contention to such an absurd extent, that the one neutralized the other, and the distressing effort was calculated to impress the jury with the conviction that there was no merit in either.

The common knowledge and experience of jurors, their acquaintance with the affairs of life and the motives of men acting under different conditions, are especially called into requisition in determing whether the facts established on the trial show negligence.

Railroad Co. v. Eckford, 71 Tex., 274.

This court has adopted the definition that negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person, under the existing circumstances, would not have done. It is said that the essence of the fault may lie in omission or commission; that the duty is dictated and measured by the exigencies of the occasion.

Wabash Ry. Co. v. McDaniels, 107 U. S., 454;
Balt. & Pot. Ry. Co. v. Jones, 95 U. S., 439.

According to this definition, the duty of the defendant company was not an unvarying one, but was shifting, and dependent on the existing circumstances; it was dictated and measured by the exigencies of that particular occasion, and comes clearly within the Pennsylvania rule above referred to. And under this rule, in order to determine whether the defendant had been guilty of negligence, it was necessary to determine, first, what were the exigencies of the occasion, second, what a reasonable and prudent man would have done under the circumstances, of that situation

(which was the duty demanded of the defendant), and, third, whether the defendant had failed to come up to that shifting standard of duty on that occasion. These are all questions which are more appropriately within the province of the jury, than of the court.

The defendant having been shown to have been guilty of negligence in the use of the road engine and flat car, because they were unsuitable appliances for that purpose, and more dangerous to its employes who were not working with it but whose duties required them to pass across the tracks, than a regular switch engine, or than the road engine itself, with proper equipments, would have been; and the deceased not having been shown to have been guilty of any contributory negligence whatever, the disaster which resulted in his death, must be considered to have been caused by, and as the proximate result of, the negligence of the defendant. This conclusion is in accord with the doctrine adhered to by this court, that where there is no intermediate efficient cause, between the original wrong and the injury, the original wrong must be considered as reaching to effect and proximate to the injury. That in such case it is necessary to determine the proximate cause of the injury or death, and the defendant's negligence being once established, and no other proximate or efficient cause being shown, such negligence should be held to be the sole proximate cause.

Milwaukee etc. Ry. Co. v. Kellogg, 94 U. S. 469.

In concluding the discussion of this question, attention is called to what was said by this court, in construing the seventh amendment to the Constitution of the United States. The amendment provides: "And no fact trial by jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

In Hepburn v. Dubois, 12 Pet 376, where this amendment was under consideration, the court took occasion to say :

"If this court can comprehend what these rules are, or promulgate them in intelligible language; they are these: That where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law to establish such fact; a jury may infer any fact from such evidence which the law authorizes the court to infer on a demurrer to the evidence; after a verdict in favor of either party on the evidence,

he has a right to demand of a court of error that they look to the evidence only, for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part, or the whole of his case. If, in its judgment, the appellate court shall hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrable therefrom; in the same manner, and with the same legal results, as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts, which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence."

D.

Another reason why the trial court did not err in refusing to give the peremptory instruction requested by the defendant, is, in its answer the defendant presented a plea of contributory negligence on the part of the deceased, as a reason why the plaintiffs could not recover, alleging: "If he was killed at the time and place alleged by plaintiffs, his death was contributed to and caused by his own inexcusable negligence and carelessness in going in and upon defendant's yards and tracks, and failing to exercise his sense of seeing and hearing which would have revealed the approach of any engine or train upon said track, and in placing himself in a place of danger without observing any care or regard whatsoever for his own safety, and but for such negligence on the part of said Gentry, his death would not have occurred at the time and place stated." (Rec. p. 10.)

This plea of contributory negligence is in its nature, a plea in confession and avoidance, and necessarily admits, or implies negligence, on the defendant's part.

Watkinds v. So. Pac. Ry. Co., 38 Fed. R., 711;
Railway v. Thomas, 79 Ky., 164;
Hoffman v. Gordon, 15 Ohio St., 215.

From its very nature, there can be no contributory negligence on the part of an injured party, except when the defendant has been guilty of negligence to which the injured party's negligence could contribute.

Ruter v. Foy, 46 Iowa, 132;
Steinmetz v. Kelly, 72 Ind., 442;
Simms v. So. Car. R. Co., 2 S. E. Rep., 486.

Its definition implies that it can exist only when the negligence of both parties has combined and concurred in

producing the injury.

4 Am. & Eng. Encyclop. of Law, p. 18, sec. 5.

It is defined to be, "a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence, and contributing to the injury as the proximate cause thereof, without which the injury would not have occurred."

Patterson's Ry. Accident Law, p. 48, sec. 47.

The defendant's plea of contributory negligence, being a plea in confession and avoidance, and being legally sufficient as such when tested by the rules of pleading, gives implied color to the plaintiffs' right of recovery on the allegations in their petition; that is, it admits the matters alleged by them to such an extent, at least, as to give them some apparent right of recovery, which must be, and is attempted to be, met and avoided by the allegation of the new matter set up by the defendant, viz: the contributory negligence of the deceased.

Stephen on Pleading, p. 203.

Therefore, if the defendant's plea in confession and avoidance is sufficient when tested by the rules of pleading, it admits color in the plaintiffs' cause of action, that is, an apparent right of recovery on the case stated, of the defendant's negligence as alleged by them, but seeks to encounter and avoid this apparent right of recovery, by counter allegations that the negligence of the deceased concurred with the admitted negligence of the defendant, and contributed to the injury which resulted in his death, as the proximate cause thereof. This admission in the plea, if it did not entitle the plaintiffs to a verdict and judgment thereon, certainly placed the matter beyond the right of the defendant to demand of the court, an instruction that the jury should return a verdict in its favor, on the ground that no negligence on the part of the defendant had been shown. This could hardly be done in the face of its plea admitting its negligence, but seeking to avoid the legal results of it, on the ground that the deceased was also guilty of negligence in the same matter, and which proximately contributed to the injury. It seems then, on reason and authority, that the trial court would not be justified in directing the jury to return a verdict against the plaintiffs, because the evidence does not show negligence on the part of the defend-

ant, in any case where contributory negligence is pleaded as a defense. For these reasons, the trial court did not err in refusing to give the peremptory instruction requested by the plaintiff in error.

The Second Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to-wit:

"'You are instructed that it is the duty of an employe or any other person about to cross the railroad track to look and listen for passing engines, cars or trains, to ascertain whether or not the same are approaching, before going upon the track, and if the party fails to exercise such care, he cannot recover. You are therefore instructed that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car, and in time to have kept off the track and prevented the injury to himself, and he failed to do so, you will find for the defendant.'

"For the reason, all the evidence clearly shows that the end of the flat car which plaintiffs claim struck and run over L. D. Gentry, was illuminated, and clearly shown by the headlight burning on the engine, and that the bell of the engine was kept constantly ringing while switching in the yard, and if said L. D. Gentry had looked or listened before stepping upon the track in front of said engine and flat car, he would have seen the same, and have known of its approach, and could have avoided the accident." (Rec. p. 86.)

The first reason which presents itself why the court did not err in refusing to give this special instruction, is, that it was one of a series of several special instructions presented to the court and requested as a whole (Rec. pp. 62–65); and as several, or all of them, were improper and could not be given, notably the sixth, which has been fully discussed under the first assignment of error hereinbefore, there was no error in refusing to give even those that may have been proper if presented alone.

Union Ins. Co. v. Smith, 124 U. S. 405;
Moulor v. Am. Life Ins. Co., 111 U. S. 335.

The others of the series will be shown to be improper when we come to consider the respective assignments of error under which they are presented.

But this special instruction, even if standing alone, was an improper one to be given the jury, because, there was

no testimony to authorize it. No eye witness saw the deceased at the time he attempted to cross the track, nor when he was struck by the car. There was no testimony before the jury that he either did or did not stop, look and listen; therefore the testimony did not authorize that instruction.

United States v. Breitling, 20 How. 252.

As there was no witness who testified that the deceased did not stop, look and listen before attempting to cross the track, the presumption is indulged that he did so; proof of that fact, that he did so stop, look and listen, was no part of the plaintiffs' case; but proof that he did not do so, was a necessary part of the defendant's defense. This is the rule in Pennsylvania where the doctrine of the obligation to stop, look and listen, prevails more rigorously than anywhere else.

Schum v. Penna. etc. R. Co., 107 Pa. St. 8.

This special instruction is also incorrect in reference to the question of contributory negligence. The failure of the deceased to stop, look and listen, before attempting to cross the track, is the only act of contributory negligence urged by the defendant's counsel, and there was no testimony whatever on the point; but if there had been any testimony to authorize an instruction on that question, it should also have informed the jury that such failure to stop, look and listen, must have been the proximate cause of the injury, in order to exonerate the defendant from liability, which the requested instruction does not do.

Whittaker's Smith on Negligence, pp. 374, 5 and 6;
Grand Trunk Ry. Co. v. Ives, 144 U. S. 429;
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551.

The Third Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to-wit:

'You are instructed that one who enters into employment attended with risk of injury of which such employe has notice, or by reas-

onable care may have notice, cannot recover compensation from the party employing him, if by exposure to such risk he is injured; that it is the duty of such employe, if he is subjected to danger on account of defective machinery, to notify the party employing him thereof, and unless the party employing him promises to remove such danger, if such employe continues in such service, he assumes the risk occasioned on account of such exposure and risk. The evidence shows that L. D. Gentry knew, or if he had exercised ordinary care, would have known of the engine and flat car being used for switching purposes; it is not claimed that he protested against the same, hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even if the same were defective appliances.'

"For the reason that the evidence shows that L. D. Gentry knew, or if he had exercised ordinary care, would have known, that the engine and flat car were being used for switching purposes, and it is not claimed he protested against the same, hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even should it appear that the same were defective appliances. The uncontradicted evidence established the fact that it was the custom of the Texas & Pacific Railway Company and had been for years prior to Gentry's death, to use a road engine with flat car attached to the front of the same for switching, when the regular switch engine was temporarily out of repair, and this fact being established, Gentry contracted in regard to same, and it was one of the natural risks incident to his employment." (Rec. p. 87.)

The first objection which occurs to this special instruction, is the same as to the last preceding one, that it was one of a series of several presented to the court in gross and refused in gross, and there was no error in refusing to give it, unless all of the others were also free from objection.

See authorities, *ante*, p 13, B.

But as an independent proposition, it is very objectionable. The language, "of which such employee has notice, or by reasonable care may have notice," used in said instruction, can certainly have no application to a case like the present, where the employe is injured by defective appliances with which he does not perform labor, and in a department of the service entirely distinct from that in which he labors. To require an employe to exercise care in ascertaining a knowledge of defects in all the appliances of a railroad, all along the line, and in every branch or department of its service, would be a monstrous doctrine, which no court could sanction. Knowledge of the risk or danger to which he is exposed, is not to be presumed in proof of contributory negligence, but must be brought home to the employe.

Smith v. Penn. Car Works, 60 Mich. 501;
Colbert v. Rankin, 72 Cal., 197.

Concerning this question, the Supreme Court of Missouri says:

"The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and foresight, and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which, in justice and sound reason, he ought to be responsible. Any other rule would be productive of the greatest injustice and wrong. The servant has no control over the matter. He acts in subordination. He relies wholly on the judgment of the master, that suitable machinery and the needed requirements are supplied. He has not the means nor the opportunity of knowing whether those furnished may be safe. His attention is exclusively due to the peculiar duties incident to his branch of the employment. He assumes the risk, more or less hazardous, of the service in which he is engaged; but he has a right to presume that all proper attention shall be given to his safety, and that he shall not be carelessly and needlessly exposed to risks not necessarily resulting from his occupation, and which might be prevented by ordinary care and precaution on the part of his employer."

Gibson v. Pac. R. R. Co., 46 Mo., 163.

And to the same effect substantially, is the rule laid down by this court.

Wabash Ry. Co. v. McDaniels, 107 U. S., 454.

And the supreme court of Texas holds, that the law does not, under any circumstances, exact of an employe, the use of diligence in ascertaining defects in appliances or instruments which he is not himself engaged in using; but charges him with knowledge of such only as are open to his observation. Beyond that he has a right to presume, without inquiry or investigation, that his employer has discharged his duty of furnishing safe and proper instruments and appliances.

Mo. Pac. Ry. Co. v. Lehmberg, 75 Tex., 67.

It is scarcely necessary to direct the attention of the court to that part of this special instruction, which would require the deceased, at the very moment when he first discovered his peril, when he was struck by the flat car and about being crushed beneath its trucks, to notify the company of the danger in using that engine and flat car, or else the company would be exonerated from liability for his

death then just about to occur. This ingenious and unique conception certainly needs no comment.

It will also be observed that the latter part of this special instruction assumes the existence of certain facts, and these assumed facts are the deductions and conclusions of the counsel, and therefore the court did not err in refusing to give this special instruction.

New Jersey Life Ins. Co. v. Barker, 94 U. S., 610.

The Fourth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to-wit:

'You are instructed that the deceased, L. D. Gentry, was at the time of his death a fellow-servant with the engineer and fireman and switchman working with engine No. 68 at the time, and of the yard-master working in the yard at the time said Gentry was killed, and if the death of said Gentry was caused by the negligence of either of said persons in failing to place a light or lights on said flat car, or otherwise, such negligence would be that of a fellow-servant with said Gentry, for which defendant is not liable; and if you find from the evidence that his death was caused by the negligence of such person or persons, you will return a verdict in favor of defendant, unless you find from the other charges given you that the same was on account of defective machinery.'

"For the reason the jury should have been instructed that if they believed from the evidence that plaintiff would not be entitled to recover on account of the death of said L. D. Gentry, if a light or lights had been placed on said platforms that defendant would not be liable herein, for the reason that it would have been the fault or negligence of said L. D. Gentry's fellow-servant in failing to have said flat car lighted, if it should have been lighted while they were operating the same on account of which fault or negligence defendant could not be held liable." (Rec., 87-8.)

The first objection to this special instruction is, that it is also one of the series of several hereinbefore referred to, which were requested as a whole, and refused by the court as a whole; and as has been seen, there was no error in refusing to give it, unless all of them were unobjectionable.

See authorities, *ante*, p 13, B.

Another reason why there was no error in refusing to give it, is that the substance of it was given in the sixth sub-division of the general charge of the court, in the following language:

"6th. Louis D. Gentry was a fellow-servant of the employes of defendant operating the switching train that killed him. The defendant is therefore not responsible for any negligence that caused his death, but if responsible at all, it must be under the 3d and 5th charges above. (Rec. p. 66.

Antony v. L. & N. R. R. Co., 132 U. S., 172.

The Fifth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to-wit:

'The acts of negligence on the part of defendant relied on by the plaintiffs are (1) the use of a road engine with a flat car in front for switching purposes, without having taken the precaution to place lights on the flat car, and (2) also in the use of a headlight on said engine so constructed that the rays of light from it reflected over and beyond the flat car, so that the position of the flat car could not be seen by the employes of defendant working in defendant's yard and using its track at Big Springs, where such switching was being done, and (3) in not having the said yard so lighted at places therein where defendant's employes were accustomed to cross the track in the pursuit of their employment.'

'You are instructed that as shown by the evidence, [1] prior to L. D. Gentry's employment by defendant and up to the time of his death said yard was not so lighted, so that in accepting the said employment said Gentry assumed the risk incident to working and being in said yard as such employe without its being so lighted; [2] that said headlight illuminated said flat car about half way furthest from the engine, so that any employe by looking before going on defendant's track in said yard could see and locate said flat car as well as said engine, and keep out of the way, as it was his duty to do; [3] that said engine and flat car was being used temporarily for switching purposes, the regular switch engine being in the shops for repairs—the flat car being attached to the engine for the safety of switchmen using the same. That the headlight reflecting its rays for several hundred yards, was attached to the front of the engine and shed its light over and made apparent the far end of the flat car, and illuminated on beyond the track,

so that any one looking and exercising proper care before going on the track, could see the same so as to avoid being run over; that the use of said engine and flat car under the existing circumstances was not negligence towards said Gentry; wherefore no negligence has been shown on the part of defendant, hence you will find a verdict for the defendant.'

"For the reason that plaintiff's alleged cause of action, and the evidence introduced upon the trial, was correctly stated therein, and from the same the defendant is in no wise liable for damages on account of the death of said L. D. Gentry." (Rec. p. 88.)

This special instruction was one of the series of several, heretofore alluded to as having been requested as a whole and refused by the court as a whole, and there was no error in the action of the court in refusing to give it, unless the whole of the series were free from objection.

See authorities, *ante*, p. 13, B.

Another reason why the court was correct in refusing to give this special instruction, is, that it assumes the existence of facts which the testimony does not authorize, and which do not exist. It assumes as facts, the deductions and conclusions of counsel from the testimony, and attempts to force those conclusions on the jury as uncontroverted facts, without leaving them any liberty of drawing their own conclusions, and it is not error to refuse to give such an instruction.

New Jersey Life Ins. Co. v. Barker, 94 U. S., 610.

And still another reason why the court was correct in refusing to give this instruction, is found in the fact that it concludes with a peremptory direction for the jury to return a verdict for the defendant, and raises the same questions that have been discussed under the first assignment of error.

The Sixth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to-wit:

'You are further instructed [1] that if you find and believe from the evidence that the deceased, L. D. Gentry, knew or could, by the ex-

ercise of care, have known or become aware of the approaching train, and could by the exercise of care and diligence, either kept off the track or gotten off the same in time to have prevented the accident, and he failed to use such ordinary care and diligence, then you will find for the defendant. You are instructed by the term "ordinary care" is meant such care or diligence as a prudent man would exercise under like circumstances; [2] you are instructed that the evidence in this case shows that L. D. Gentry, if he was run over by said flat car and engine, stepped on defendant's track just in front of same, when, if he had exercised proper care in looking for approaching engines, cars or trains before going on the track, he would have seen the same, and could have avoided the accident; that in so going upon the track he was guilty of contributory negligence, and plaintiffs are not entitled to recover herein, hence you will find a verdict for the defendant.'

"For the reason the evidence conclusively shows that if said L. D. Gentry had looked before stepping upon the track that he would have known of the approaching engine and car, and by the exercise of ordinary care could have prevented the accident resulting in his death. The evidence conclusively shows that if said L. D. Gentry was killed by said engine and flat car, it was on account of his own contributory negligence in failing to look out for danger before stepping upon the track." (Rec. p. 89.)

The first objection to this instruction is, that it is one of a series of several special instructions presented to the court as a whole, and refused as a whole, and therefore should not have been given unless all of the series were free from objection.

See authorities, *ante*, p. 13 B.

The second objection to it is that it assumes as facts, the conclusions of counsel from the testimony; and as has been seen, it is not error to refuse such a special instruction.

See authorities, *ante*, p. 40.

The third objection to it is, that it concludes with a peremptory direction to the jury to return a verdict for the defendant, which has been fully discussed under the first assignment of error.

Another objection to it is, that it imposes on an employe, diligence in ascertaining defects or unsuitableness in appliances furnished by his employer, and with which he does not work but are used in a different branch of the service, which, as has heretofore been seen, is not the law.

See authorities, *ante*, p. 37.

And still another objection to it is, that in so far as it attempts to refer to the question of contributory negligence,

it states the doctrine incorrectly as defined and illustrated by the authorities, in that it does not tell the jury that the contributory negligence of the deceased which would have relieved the defendant of liability, must have been the proximate cause of the injury.

Whittaker's Smith on Negligence, pp. 373 to 384;
Grand Trunk Ry. Co. v. Ives, 144 U. S., 429;
Inland & Seaboard Coasting Co. v. Tolson, 139 U. S. 551.

The Seventh Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in charging the jury in paragraph 1, of his charge, as follows:

'In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1891, was run over and killed by a flat car of defendant propelled by a switch engine in its yards at Big Springs, Texas.'

"Because the charge assumes as an uncontroverted fact, and instructs the jury that there is no dispute in this case as to L. D. Gentry's having been run over and killed by a flat car of defendant propelled by the engine in its yard at Big Springs, when this was a controverted and material fact and was wholly unestablished by the plaintiffs, and this fact should have been submitted to the jury for their conclusion from the evidence." (Rec. p. 49.)

The alleged error consists in the assumption as an uncontroverted fact, the manner and means of Gentry's death. This objection is exceedingly hypercritical, for no one can read the testimony without becoming convinced beyond a doubt, that the cause of his death was as stated in the charge, and there was no error in assuming it to be an uncontroverted fact.

The date of the year as stated in the charge, as being in the year 1891, instead of 1890, as shown by the testimony and the allegations in the petition, is clearly a misprint or a clerical error.

The Eighth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern district of Texas in

charging the jury in paragraph 2 of his charge, as follows:

'Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car, or in crossing said track for any other purpose.'

"Because the charge failed to instruct the jury as to what degree of care was required of him; it failed to instruct the jury that it was the duty of deceased to look and listen for passing engines, cars and trains before going upon the track, as requested by defendant in its special instruction. It failed to instruct the jury that if he saw the train, or by the exercise of ordinary care could have seen the same and attempted to cross the track and stepped on the track just in front of the car, that his own contributory negligence would prevent a recovery. The charge merely instructs the jury that the deceased assumed the risk naturally incident to crossing the track of defendant to reach his car, or for any other purpose." (Rec. p. 90.)

This charge is so favorable to the defendant that the law will not permit it to assign error thereon.

But the alleged errors are of omission, and not of commission; they are negative rather than positive; the plaintiff in error complains of what it does not contain, and not of what it does contain. Therefore, this court will not entertain such an assignment, unless the record affirmatively shows that the defendant called the omissions complained of to the attention of the trial court, by requesting proper and suitable instructions, good in point of law, free from all objections, appropriate to the evidence and covering the errors complained of. This the record shows the defendant did not do.

Cong. & Empire Spring Co. v. Edgar, 9 Otto, 645;
Mutual Life Ins. Co. v. Snyder, 93 U. S. 393;
Ins. Co. v. Piaggio, 16 Wall. 378;
Shuttle v. Thompson, 15 Wall. 59;
Castle v. Bullard, 23 How. 172, 189;
Pennock v. Dialogue, 2 Pet. 1;
Hudson v. Charleston, C. & C. R. Co., 55 Fed. R. 258;
2 Thompson on Trials, Sec. 2341.

The Ninth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in confining the jury, by paragraph 4 of its charge, to evidence only as to the custom of the particular road, the defendant, in its use of a

road engine and flat car for switching purposes; for the reason the evidence shows (which evidence was admitted without objection), that the custom of using such appliances existed on many other roads in and out of Texas, and that the use of the same was customary and usual, and was in no wise negligence. (Rec. p. 90.)

There was no error in this charge, for it is well settled in this court, that the custom of other railroads is no criterion by which to determine whether the particular acts of some other railroad under investigation, amount to negligence; other railroads may be also negligent, as was said by this court in a recent case.

Northern Pac. Ry. Co. v. Mares, 123 U. S. 710;
Grand Trunk R. Co. v. Richardson, 1 Otto, 454;
Wabash R. Co. v. McDaniels, 107 U. S. 454.

The Tenth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in charging the jury in paragraph 5, of his charge, as follows:

'A corporation is liable in damages to its employe who is injured by the use of defective machinery, or machinery not adapted to the purpose for which it is used. The master, however, is not responsible if the employe had full knowledge of such defect or want of adaptability of the machinery used for the purposes for which it is used.'

"For the reason the charge only exonerates the defendant from liability in event said L. D. Gentry had full knowledge of the defect or want of adaptability of the machinery used, when in fact the servant cannot recover of the master when the former knew, or by the use of ordinary care, could have known of the defective machinery (Rec. pp. 90–1.)

The complaint to this charge is aimed at the use of the words, "full knowledge," as used therein. The charge is correct in that particular; but if it did not go far enough to suit the views of counsel, they should have preferred a special instruction embodying their view of the question, which was not done. The question is of the same character as the one presented under the eighth assignment of error, and the same principles there invoked and the authorities there cited are also applicable here.

See Authorities, *ante* p. 43.

It is suggested also, that the charge is not subject to criticism, as applied to the facts in this case; for it is a part of the defense of contributory negligence undertaken by the defendant, to show that the deceased knew of the unsuitability of the appliance used for switching purposes, and the language used in the charge amounts to nothing more than that such knowledge must be brought home to the deceased by clear and satisfactory evidence.

Smith v. Penn. Car Works, 60 Mich. 501;
Colbert v. Rankin, 72 Cal. 197;
Eddy v. Wallace, 1 Cir. Ct. App. R. 440;
Schum v. Penn. etc. Ry. Co. 107 Pa. St. 8.

The Eleventh Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in charging the jury in paragraph 3 of his charge, that, 'if the machinery was defective and unsafe by reason of whether the light from the headlight struck the flat car and track on the road, or from other defects disclosed from the evidence, and the same occasioned the death of said L. D. Gentry, the defendant would be liable;' for the reason that as charged in paragraph 6 by the Court, L. D. Gentry was a fellow-servant of the employes operating the machinery used for switching, and if his death was caused by a defect caused from said employes failing to place one of their lanterns on the far end of the flat car from the engine, which the jury could conclude was embraced in 'other defects disclosed by the evidence,' and defendant would not be liable on account of such defects. (Rec. p. 91.)

The gravamen of the complaint against this charge is, that the use of the words "or from other defects disclosed by the evidence," was calculated to mislead the jury into believing that they would be thereby authorized to find for the plaintiffs if they believed that the death of the deceased was caused by the failure to put lights on the flat car, as being one of the "other defects disclosed by the evidence," referred to in the charge. But this objection is not tenable, because the failure to put lights on the flat car cannot be classed as a "defect" in the machinery or appliance. The court would not be warranted in presuming that the jury were so ignorant as to do so. Moreover, the sixth paragraph of the same charge tells the jury expressly, that the plaintiffs could not recover if the death of the deceased was caused by the failure of the other employes to put lights

on the flat car, because they were fellow-servants of the deceased, and the defendant would not be liable for their negligence in failing to do so. And again, the third paragraph of the general charge specifically restricts the right of the plaintiffs to recover, to the unsuitability or the inadaptation of the road engine and flat car to switching purposes, and to the defective construction or arrangement of the headlight on the engine. It is not to be presumed that the jury misunderstood it. The charge must be read all together as a whole, and the jury must be presumed to have done the same, and not that they were unduly influenced by isolated parts of it.

2 Thompson on Trials, Sec. 2407.

The Twelfth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in giving to the jury the following special instruction requested by plaintiffs, as follows:

'The law does not exact of an employe the use of diligence in ascertaining defects in the appliances or instruments furnished by railroad companies, but charges him with knowledge only of such as are open to his observation. Beyond that he has a right to presume without inquiry or investigation that his employer has discharged its duty of furnishing safe and proper instruments and appliances.'

"Because the defects, if any existed in said engine and flat car, so far as the use of same was dangerous to said L. D. Gentry, were patent defects, and it is the duty of an employe to use ordinary care to observe patent defects, and the instruction was incorrect." (Rec. p. 91.)

The only objection urged to this instruction is, "that the defects, if any existed in said engine and flat car, so far as the use of the same was dangerous to said L. D. Gentry, were *patent* defects, and it is the duty of an employe to use ordinary care to observe patent defects." This complaint seems to be a war of words, a distinction without a difference; for it is clear that defects which are open to observation, must of necessity be *patent* defects. Patent means open, apparent, plain, obvious.

But the proposition contained in the charge is based on common sense and authority.

Mo. Pac. R. Co. v. Lehmberg, 75 Tex. 62.

The Thirteenth Assignment of Error,

Is as follows :

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in rendering the judgment upon the verdict of the jury, for the reason that the same was contrary to the charge of the court in the 6th paragraph of said charge, which instructed the jury as follows:

'L. D. Gentry was a fellow-servant of the employes of the defendant operating the switching train that killed him, and defendant is therefore not responsible for any negligence that caused his death, but if responsible at all must be under the 3d and 5th charges above."

"For the reason that if L. D. Gentry was killed by the engine and flat car, which is not admitted, and if the same did not result from his own negligence, which is charged, it resulted from the negligence of said employes operating said engine and flat car in failing to put one of their lanterns on the front end of the flat car furthest from the engine when moving about in the yard, hence the verdict and judgment should have been for the defendant." (Rec, pp. 91–2.)

This assignment is based on alleged error in the action of the court in entering up judgments on the verdict of the jury, because, as is alleged, the jury found contrary to certain charges and instructions of the court. These are of such a character that error cannot be assigned on them. They are matters entirely within the discretion of the trial court, the same as the overruling of a motion for a new trial, and cannot be corrected on a writ of error.

Chesapeake & Ohio Canal Co. v. Knapp, 9 Pet. 541;
Railway Co. v. Heck, 102 U. S. 120;
Schuchard v. Allen, 1 Wall. 359;
Brown v. Clark, 4 How. 15.

The Fourteenth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in admitting in evidence over the objection of defendant the testimony of the witness Ernest Harrison, as follows:

'I think he, L. D. Gentry, was killed while walking across the track from his home to the engine '

"Because said witness was not present when L. D. Gentry was killed, and did not see or know how he met his death, as shown by the witness' evidence, hence the statement objected to was a mere guess and inadmissible." (Rec. p. 92.)

The fact testified to was proved beyond a doubt by all the testimony; the court assumed it to be an established fact in its charge to the jury; and no one can read the testimony and come to any other conclusion. Besides, the defendant did not move to suppress the deposition, nor to strike out the answer, although it had long been on file, nor did it give any notice of its objections thereto, until the deposition was offered to be read on the trial, and it thereby waived any objections thereto.

Howard v. Stillwell & B. Mfg. Co., 139 U. S. 199.
Brown v. Mitchell, 75 Tex. 10.

The Fifteenth Assignment of Error,

Is as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in admitting in evidence over the objection of defendant the testimony of the witness Ernest Harrison, as follows:

'I have never in all my life seen a headlight placed on a flat car, but I have frequently seen a white lantern so placed at the furthest end from the engine, and saw it done many times at Big Springs.'

"Because such evidence was inadmissible, not being responsive to the interrogatory, which was as follows:

'7th cross-interrogatory—If in answer to the 7th direct interrogatory you say that a headlight placed on the front end of the flat car furthest from the engine referred to, would conduce to safety, please state if it is not a fact that in all the experience of your life you have never seen a headlight fastened on the front end of a flat car which was coupled to a road engine while used for switching purposes? If you ever saw it, please state when and where, upon what road and under whose supervision? Have you seen it more than once, if so please specify each time and place where you saw it?'

"Defendant further objected for the reason that the witness does not show when and where he saw such white lantern so placed, whether on this car or some other car, or whether before or after this accident." (Rec. p. 92.)

These objections were first made at the trial when the deposition was offered in evidence, and no motion was made to strike out the answer, nor any notice given of any objection to it until it was offered in evidence; and therefore, all objections to it were waived. (Rec. p. 21.)

Howard v. Stillwell & B. Mfg. Co., 139 U. S., 199;
Brown v. Mitchell, 75 Tex., 10.

Furthermore, the testimony became immaterial, and did the defendant no injury, because, in its charge, the court withdrew from the jury, all consideration of the question to which the answer related, by directing them in the sixth paragraph of the charge, that the plaintiffs could not recover if the death of the deceased was caused by the failure to put lanterns on the flat car, because the employes whose duty it was to do so, were the fellow-servants of the deceased. Even if it was wrongly admitted, it is not ground for reversal, under these circumstances.

Insurance Co. v. Unsell, 144 U. S., 439.

The Sixteenth Assignment of Error,

as follows:

"The said Circuit Court of Appeals erred in its judgment affirming the judgment of the Circuit Court for the Northern District of Texas, in admitting over the objection of defendant the testimony of Thomas A. Gentry, as follows:

'He, L. D. Gentry, was killed by being run over by a flat car attached to and ahead of engine No. 68, which was being used for a switch engine in Big Springs T. & P. railway yards.'

"Because the witness was not present when L. D. Gentry was killed, and did not see or know how he met his death, as shown by the witness' evidence, hence the statement objected to was a mere guess and inadmissible." (Rec. p. 93.)

The fact testified to was established by an abundance of other testimony that was not objected to, and the court, in its charge, assumed it to be an uncontroverted fact.

The bill of exceptions shows that when this answer was offered in evidence, the defendant's counsel objected to it on the ground above stated, but does not further show that the objection was overruled, nor what action was taken on it, nor that counsel excepted to any ruling of the court thereon; and therefore, there is no exception on which to predicate an assignment of error. (Rec. pp. 44 and 45.)

Laber v. Cooper, 7 Wall. 565, paragraph III of opinion;
United States v. Breitling, 20 How., 252.

Thus it will be seen that there is no merit in a single one of the numerous assignments contained in the record; and if the court should conclude that the motion to dismiss should be overruled, in whole or in part, then the defend-

ants in error submit that their motion to affirm, united with said motion to dismiss, should be granted; because all the questions raised in the record and relied on by the ~~defendant~~ in error, are well settled adversely to it, and it is apparent that the writ of error in this case was sued out for delay only.

Micas v. Williams, 104 U. S., 556;

Chanute City v. Trader, 132 U. S., 210.

And so, the defendants in error pray the court as in their said motion.

Respectfully submitted,

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Attorneys for Defendants in Error.

FILED.
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No. 15,369.

Supreme Court of the United States.

OCTOBER TERM, 1893.

TERM No. 985.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MAY GENTRY ET ALS.,
Defendants in Error.

ERROR TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Briefs on Motion to Dismiss or Affirm and Motion for Leave to Amend Writ of Error.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
For Plaintiff in Error.

C. G. BURGOYNE, WALKER AND CENTRE STS., NEW YORK.

Supreme Court of the United States.

OCTOBER TERM, 1893. No. 985.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MAY GENTRY ET ALS.,
Defendants in Error.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Brief in Opposition to Motion to Dismiss.

STATEMENT.

This cause was originally instituted in the District Court of Dallas County, in the State of Texas, and was removed by the defendant into the Circuit Court of the United States for the Northern District of Texas, on the ground that said defendant was, and is, a corporation by virtue of the laws of the United States. It is brought under Title 52 (Articles 2899–2906) of the Civil Statutes of Texas, which relates to actions for injuries resulting in death, to recover damages for the death of

Louis D. Gentry. The plaintiffs are May Gentry, his widow, Olive Lee Gentry and Thomas M. Gentry, their minor children, and Mary A. Gentry, his mother, all of whom are included in the terms of Article 2903, specifying for whose benefit such an action may be brought.

The case was submitted to a jury, who brought in a verdict in favor of the plaintiffs in the sum of $10,166.66, apportioned among plaintiffs as follows: May Gentry, $4,166.66; Olive Lee Gentry, $2,500; Thomas M. Gentry, $2,500; Mary A. Gentry, $1,000.

This apportionment by the jury was apparently made in accordance with the terms of Article 2909, hereinafter quoted (post, p. 5).

The judgment, which was entered January 31, 1893, recited the verdict in full and proceeded (Record, pp. 12, 13) "It is therefore considered by the Court, and it is so ordered and abjudged, that" May Gentry recover from defendant $4,166.66, with interest, &c., "for which let execution issue." "It is further considered," &c., that Olive Lee Gentry recover from defendant $2,500 with interest, &c., "for which let execution issue." Similar dispositions are made in favor of Thomas Lee Gentry for $2,500, and Mary A. Gentry for $1,000, and provision is made in each case for the issue of execution.

It was further ordered that plaintiffs recover their costs from defendant "for which execution may also issue;" and also that all officers of the court and parties entitled to costs recover from plaintiffs and the sureties on their cost bond the costs of both parties "for which execution may also issue."

A writ of error was sued out from the United States Circuit Court of Appeals, for the Fifth Circuit, which Court on June 27, 1893, being divided in opinion, pro-

nounced judgment (Record, p. 85) affirming the judgment of the Circuit Court and adjudging that the plaintiff in error and the sureties on its writ of error bond "be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court."

The cause was brought here for review by writ of error, and defendants have interposed motions to dismiss the writ on grounds relating only to the *form* of the judgment rendered and of the writ of error.

ARGUMENT.

I.

The plaintiff Mary A. Gentry, the mother of deceased, to whom $1,000 of the total verdict of $10,166.66 was apportioned by the jury, now moves to dismiss the writ of error so far as she is concerned for want of jurisdiction, claiming that a separate verdict was found and a separate judgment entered in the Circuit Court for $1,000 in her favor, which sum is not sufficient under the Act of March 3d, 1891, to give this Court jurisdiction.

The question presented by this motion is clearly defined. Was the judgment of the Circuit Court (Record, pp. 12, 13) one judgment, or did it comprise four separate judgments for damages and two others for costs?

In discussing this motion of Mary A. Gentry, her counsel have assumed what they elsewhere deny (as we shall hereafter see), that this Court is called upon to review the action of the Circuit or trial Court, and not that merely of the Circuit Court of Appeals.

This assumption is probably made to escape the decision of this Court in *Zeckendorf vs. Johnson, 123 U. S., 617*, which was an appeal from the Supreme Court of a Territory affirming the judgment of an inferior Court. It was there held—the Court speaking by CHIEF-JUSTICE WAITE:

"The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the Supreme Court of the Territory, and not at the time of the judgment of the District Court. Adding the interest to the judgment of the District Court until the date of that of the Supreme Court, as we must for the purpose of determining our jurisdiction *(The Patapsco, 12 Wall., 451; N. Y. Elevated Railroad vs. Fifth National Bank, 118 U. S., 608)*, we find that the amount due at the time of the judgment of the Supreme Court was considerably more than $5,000. The motion to dismiss is, therefore, denied."

Assuming, however, with the learned counsel for the defendant, that this Court will pass upon the proceedings of the trial Court without reference to the action of the Court of Appeals, we proceed to discuss the question whether the record shows a separate judgment in favor of Mary A. Gentry.

Article 1337 of the Civil Statutes of Texas provides that "only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law."

It becomes necessary therefore, to inquire whether in this cause any special provision has been made by law for more than one judgment.

An examination of the statutes will compel the conclusion that but one recovery for injuries resulting in death is contemplated or provided for. Nearly every article refers to "an action" or "the action,"

and nowhere is more than one action authorized or referred to.

Article 2903 (quoted in brief of counsel for defendants in error on this motion, p. 2) specifies for whose benefit the action may be brought and directs that "the *amount recovered* therein shall not be liable for the debts of the deceased."

By Article 2904 it is provided that "the action may be brought by all of the parties interested, or by any one of them for the benefit of all."

Article 2905 makes it the duty of the personal representative of the deceased to "commence and prosecute the action" in case the parties entitled to its benefit fail to do so within three months after the death of the deceased.

Article 2906. "The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives." This section also provides that, in case of the death of a sole plaintiff, "some one or more of the parties entitled to the money recovered may, by order of the Court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled."

But the right of any one plaintiff to a separate judgment, if any exists, is founded upon Article 2909, as follows :

"Article 2909. *Damages apportioned by jury.* The jury may give such damages as they may think porportioned to the injury resulting from such death ; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."

A reasonable construction of this language necessitates the conclusion that it contemplates but one recovery of damages for the *entire* injury. This is evident from the power given to the jury to give such damages "as they may think *proportioned to the injury* resulting from such death" as well as from the further provision that the amount recovered shall be "divided among the persons *entitled to the benefit of the action*, or such of them as shall then be alive"—not confining such division to actual plaintiffs. It has been so held in Texas.

Railway Co. vs. Moore, 49 Tex., 31.
Railroad Co. vs. La Gierse; 51 Tex., 189.

If the defendants' contention is correct a case might easily arise in which the trial Court would be compelled to pronounce a separate judgment in favor of a stranger to the record.

We respectfully submit that there is nothing whatever in this article, standing by itself, justifying the entry of a separate judgment in favor of any one of several persons entitled under the act to the benefit of the action; and that when considered in connection with the other articles of the act the conclusion is irresistible that but one judgment was contemplated and provided for, the proceeds whereof are to be "divided" among the several beneficiaries in the proportions designated by the jury.

This conclusion is not in conflict with the ruling in Railway Co. vs. Moore, 49 Texas, 31, where it was held that "the judgment should award to each of the parties for whose benefit the action is brought the share as found and directed by the jury," and that where "the judgment fails to divide the damages assessed by the jury among the parties as directed by

the statute, it is error." But one judgment is suggested by these cases which, however, must direct how the amount recovered shall be divided. Careful examination of the decisions of Texas Courts has failed to disclose any case where separate judgments were entered under this statute.

Any other theory will lead to pronounced injustice, for if separate judgments are entered in favor of the several plaintiffs they will have precedence according to the order of their entry or according to the order of the levy of executions, in which case it would be possible that the plaintiff whose good fortune placed his name at the head of the list of plaintiffs or the plaintiff whose superior sagacity and celerity enabled him to issue the first execution, might secure to himself all the property of a defendant to the exclusion of the others; and this might be the result of a proceeding provided by statute for the benefit of all persons interested.

Viewing the contention of this defendant from another point it may happen that a jury which finds a verdict for $10,000 against a defendant, under this statute, may deprive him of all possibility of a review by this Court by apportioning $1,000 to each of ten plaintiffs.

Again, Article 2909 provides that "the amount so recovered shall be divided among the persons entitled to the benefits of the action or such of them as shall then be alive." No reference is made here to representatives of a deceased plaintiff. *Quære;* if a plaintiff dies after verdict and before judgment what becomes of the share to which he would be entitled, if alive, in case, as defendant contends, each plaintiff has an interest in his separate judgment only?

Whether or not Mary A. Gentry, the mother of de-

ceased, has any right to an individual judgment independent of the statute here under consideration, or whether her cause of action is different in its nature from that of the other plaintiffs, is not now material or relevant, because, as a fact, she joined with the other plaintiffs to enforce the rights given to all of them by the statute. Her rights are the same as those of the other plaintiffs, and she has no others in an action brought under the statute.

It is evident that the intent and purpose of the statute can only be realized by one judgment for the benefit of all the plaintiffs, the amount recovered thereby to be divided among them in the proportions designated by the jury. The judgment entered in this cause must be so construed and treated; otherwise the provisions of the statute establishing the rights of plaintiffs will be violated.

The rule invoked by counsel for defendants in error that "distinct judgments in favor of or against distinct parties, though contained in the same record, cannot be joined to give this Court jurisdiction" (Brief, p. 3) is not applicable to this case. In the case at bar the Statute of Texas gave a right of recovery in one action to all of the plaintiffs (Art. 2903), and authorized the jury (Art. 2909) to "give such damages as they may think *proportioned to the injury* resulting from such death." All of these plaintiffs have a common right in the recovery, but their several shares are apportioned by the jury. Under these circumstances the rule applicable as to the jurisdictional amount is that pronounced in Shields vs. Thomas, 17 How., 3. In that case a court in Kentucky had rendered a decree in favor of the representatives of a deceased person, apportioning to each his share. They united in a bill in

equity brought in a court in Iowa, where defendant resided, to enforce the decree rendered in the Kentucky Court.

Chief-Justice TANEY said (pp. 4, 5):

"The whole amount recovered against Shields, in the proceedings in Iowa, exceeds $2,000; but the sum allotted to each representative who joined in the bill was less; and the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him, and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable; and if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the Court, and the appeal must be dismissed.

"But the Court think the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him.

* * * * * *

This being the controversy in Kentucky, the decree of that Court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky Court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds $2,000. We think the Court, therefore, has jurisdiction on the appeal."

The rule thus announced was approved by Chief

Justice WAITE in *Ex parte* Baltimore & Ohio Railroad Co., 106 U. S., 5.

For these reasons we submit that the motion of Mary A. Gentry should be denied.

II.

The second motion to dismiss is made on behalf of all the defendants in error on the ground that this Court has no jurisdiction of the cause because the judgment of the Circuit Court of Appeals, to review which this writ of error is sued out, is not such a final judgment as can be reviewed by this Court.

In discussing this proposition counsel for defendants in error, with some elaboration, establish the proposition that the judgment here in question is that of the Circuit Court of Appeals. This we do not dispute. Objection is made, however, to the jurisdiction of this Court to review the judgment of affirmance entered by the Circuit Court of Appeals on three grounds which we discuss in the order in which they are made:

(a) It is claimed that the judgment of affirmance, without specifying the sum for which it is rendered, is not a final judgment from which a writ of error will lie. To sustain this point counsel cite four cases, three of of which are appeals from the Circuit Court in admiralty.

In admiralty cases an appeal from the District Court vacates its decree, and a new trial is had and a new decree entered in the Circuit Court. A simple affirmance by the Circuit Court is, therefore, not proper.

The Lucille, 19 Wall., 73.

In the fourth case, Wheeler vs. Harris, 13 Wall., 51, two judgments were rendered below, one affirming a judgment of an inferior court with costs "to be taxed," and another also affirming the judgment of the inferior court and adjudging a fixed sum for costs. Writs of error were taken from both judgments.

This Court selected the latter as a final judgment, saying: "It may be that the first appeal was from a decree which might be taken as final if the second decree had not been rendered."

What is a final judgment within the meaning of the statute authorizing writs of error from this Court has been definitely determined:

In Mower vs. Fletcher, 114 U. S., 127, a writ was issued from this Court to the Supreme Court of California, which had rendered a judgment that the judgment of an inferior Court "be and the same is hereby reversed, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for plaintiff, as prayed for in the complaint."

Held to be a *final* judgment. WAITE, C. J.:

"That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here the Court below would have nothing to do but execute the judgment it had already rendered (Bostwick vs. Brinkerhoff, 106 U. S., 3."

(b) It is further claimed that a final judgment from which a writ of error will lie must be one which authorizes the issuance of execution to enforce it, either by the Court which renders it, or by the Court which is authorized to issue the execution.

Admitting in the fullest sense the correctness of this test, it is obvious enough that it is met by the form as

well as the legal effect of the judgment of the Circuit Court of Appeals. That judgment affirmed the judgment below. The judgment below authorized the issue of execution, and was affirmed with that effect. The judgment of the Court of Appeals also included a provision for execution for costs in that Court, such execution being the only execution unprovided for in the judgment affirmed.

The cases cited by counsel for defendants in error are wholly pointless. The objection is disposed of by Mower vs. Fletcher, 114 U. S., 127, above cited and quoted from. If the objection as made were tenable, it would invalidate a large proportion of the judgments of this Court.

(c) It is further claimed that this judgment is not final, because it fails to dispose of the case as to one or more of the parties. Cases from the Supreme Court of Texas are cited to sustain this proposition. We respectfully submit that this Court, and not the Courts of the State of Texas, will decide what is a final judgment, to correct which it will issue its writ of error to the Circuit Court of Appeals.

In order to make this point applicable to the case at bar, counsel for defendants in error are compelled to contend (Brief, p. 7) that the sureties on the supersedeas bond, given on error from the Circuit Court to the Circuit Court of Appeals, are parties; and that "defendants in error were entitled to a judgment giving them the benefit of the additional security to protect them against the hazard of delay."

The remedy for breach of a supersedeas bond is by an action upon it. No judgment can be rendered

against the sureties upon it until it appears that its conditions have been broken.

This Court has had before it many cases brought to enforce the conditions of such bonds.

Ives vs. Bank, 12 How., 159.
Sessions vs. Pintard, 18 How., 106.
Babbitt vs. Finn., 101 U. S., 7.

III.

Defendants also move to dismiss, because all the defendants in error are not named in the writ of error, but are designated therein merely as "Mary Gentry and others."

That this is a defect under the rulings of the Court we do not deny. To correct it we have filed a motion for leave to insert in the writ of error the names of the other defendants in error, which motion is submitted with the motions to dismiss or affirm. The names of all are fully stated in so many places in the record (Petition, p. 1; Bond for Removal, p. 8; Testimony, pp. 18, 19, 44; Verdict and Judgment, pp. 12, 13; Petition for Writ of Error, p. 79; Bond, p. 80; Writ to Court of Appeals, p. 81; Citation, p. 83; Supersedeas Bond on Writ to this Court, p. 94; Citation issued thereon, p. 96) that the failure to set them all out in the writ of error may be fairly assumed to have been a clerical error or a thoughtless omission. No claim is made that any person or party has been injured by this omission. Under these circumstances the case is clearly one in which this Court will exercise the dis-

cretion allowed it by Section 1005 of the Statutes and grant leave to amend.

Moore vs. Simonds, 100 U. S., 145.

We deny that in this case the neglect to name all of the defendants in error in the writ of error of itself gives such color of a right to dismiss as will authorize this Court to look into and examine the record with a view to an affirmance on motion.

Such an examination of the record will involve the determination of all the numerous and important questions of law preserved in it, the proper consideration of which can only be had after argument on the merits. Such an examination is not necessary for the decision of the motions to dismiss, which, as we have seen, are based solely upon the *form* of the judgment and writ of error. Motions to dismiss on this ground are to be decided according to the circumstances of each case.

Pearson vs. Yewdall, 95 U. S., 294, 296.

The cases cited by counsel for defendants in error to support their proposition that the omission of some of the names of the parties to the writ of error gives sufficient color for the motion to dismiss to authorize this Court to consider the motion to affirm will, upon examination, be found insufficient to justify such action in this case.

In Pearson vs. Yewdall, 95 U. S., 294, both parties severally claimed compensation for land taken by the City of Philadelphia, and the question on the motion to dismiss was whether the city was a necessary party to the writ of error.

It required an examination of the record to ascertain whether the rights of the city were involved, and such

examination revealed the fact that but one question was raised in the record, which this Court had decided "over and over again."

So in Moore vs. Simonds, 100 U. S., 145, an examination of the record being necessary to a determination of the motion to dismiss, it was found that but one simple question was preserved, which "was so clearly right," that the Court was "not inclined to hear the argument" upon it.

In Zeckendorf vs. Johnson, 123 U. S., 617, the motion to dismiss was not based on want of proper parties to the writ of error, but on the amount involved. The ruling of the Court upon it is stated above (p. 4).

We, therefore, confidently claim that the motions of defendants in error have no foundation in law or in the practice of this Court, and that their determination requires no such examination of the record as will justify this Court in entertaining the motion to affirm, or in deciding the several questions involved, without oral argument upon the merits to which the parties are entitled:

> "The practice of not entertaining a motion to affirm unless there is some color of right to a dismissal has since been frequently sustained by this Court," citing cases.
>
> Chanute City vs. Trader, 132 U. S., 210-213.

The motions to dismiss should be denied.

If, however, the Court concludes that it may properly consider the motion to affirm, we submit a brief upon that motion at the same time respectfully urging our right to be heard orally on the merits.

Brief in Opposition to Motion to Affirm.

Statement.

Plaintiffs alleged in their petition (Rec., p. 3) that Gentry was "run down and killed by a flat car coupled in front of a locomotive that was being used by the defendant for switching purposes;" that the flat car and locomotive were unskillfully, carelessly and negligently constructed, handled, operated and propelled by defendant, and that he was killed "without any fault or negligence on his part" (Rec., p. 4). Defendant demurred to the petition as being insufficient in law, pleaded a general denial and special defenses of contributory negligence of deceased in failing to exercise his senses of seeing and hearing, and that the negligence of defendant, if any, was that of a fellow servant of said Gentry (Rec., pp. 10, 11).

A statement of other facts sufficient for the purposes of this motion has already been made in our brief on the motion to dismiss (*Ante*, p. 1).

Argument.

In order to justify this Court in affirming the judgment of the Circuit Court of Appeals on this motion, thus depriving plaintiff in error of its right to be heard orally upon the merits, it must clearly appear from the record either, *first*, that the writ of error is sued out merely for purposes of delay, as in Micas vs. Williams, 104 U. S., 556; or, *second*, that the questions of law preserved in the record have already been definitely decided by this Court adversely to plaintiff in error, as in Pearson vs. Yewdall, 95 U. S., 296, where this Court

had decided the point raised "over and over again;" or, *third*, that the questions preserved in the record are frivolous, as in Moore vs. Simonds, 100 U. S., 145, where the judgment below was "so clearly right" that this Court was "not inclined to hear argument" upon it, and Chanute City vs. Trader, 132 U. S., 210, 214, in which the contention of plaintiff in error was held to be "too plain for discussion."

If, therefore, it appears that the writ of error in this case was not sued out for purposes of delay, and that any assignment of error contained in the record has not been by this Court decided adversely to plaintiff in error, and is not frivolous, this motion must be denied.

That the writ of error was not sued out for delay, and that the questions brought up by the record are not frivolous, conclusively appears from the opinion of the Circuit Court of Appeals, which is as follows:

"*Per Curiam:* The Judges being divided in opinion, the judgment of the Circuit Court is necessarily affirmed. The case being one in which the judgment of the Circuit Court of Appeals is not final, it is not deemed necessary to order a reargument before a full bench, nor proper to certify questions to the Supreme Court for instructions. Judgment affirmed with costs" (57 Fed. Rep., 422).

That the questions involved are not frivolous may be inferred also from the serious and labored attention bestowed upon them by counsel for defendants in error.

For the purposes of this motion it is not necessary now to discuss all the questions preserved in the 16 assignments of error, and we therefore confine ourselves to showing that some of them, at least, require the deliberate consideration of this Court.

First Assignment of Error.

(Rec., p. 86; Deft.'s Br., p. 10.)

The first error assigned is that the Circuit Court of Appeals was in error in affirming the action of the trial Court in refusing to give the following instruction, as requested by defendant:

"You are instructed that plaintiffs in this action have failed to prove their case, and have shown no right to recover. You are therefore instructed to find for the defendant."

The first objection to this assignment of error made by defendant in error (Br., p. 11) is that it "cannot avail the plaintiff in error, because its failure to request the peremptory instruction at the close of the plaintiff's testimony, and to stand on that alone, and going to the jury on the issues and introducing testimony in its own behalf, is a waiver of the error, if there was any."

Counsel have apparently confounded a request for an instruction to the jury with a motion to direct a verdict made at the close of plaintiff's case.

The authorities cited undoubtedly hold that an exception made on the denial of such a motion is waived if defendant proceeds with his case and does not rely upon the exception, but a motion of that character is not the subject of this assignment of error.

"It is the well-settled law of this Court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that a verdict if returned must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

Randall vs. Balt. & O. R. R., 109 U. S., 478, 482: In the case last cited, the record shows that "at the

close of the whole evidence the Court directed the jury to return a verdict."

Commissioners vs. Clark, 94 U. S., 278, 284.
Del. & Lack. R. R. Co. vs. Converse, 139 U. S., 469.
Richmond & Danville R. R. vs. Powers, 149 U. S., 43.

B.

Objection is also made (Br., p. 13) to this assignment of error because, as is claimed, it was one of six instructions asked for by defendant below in writing which were presented and refused "as a whole" and not *seriatim*. The same objection is made to each of the first six assignments of error.

By the record it appears (p. 65) :

"These special instructions the Court refused, and the defendant then and there excepted before the jury retired to the action of the Court *upon each of said six instructions at the time of the refusal thereof.*"

Exceptions having been taken to the action of the Court upon each of the six requests for instructions, the case does not come within the rule applied in Union Ins. Co. vs. Smith, 129 U. S., 405 ; and Moulor vs. American Life Ins. Co., 111 U. S., 335, in both of which cases a "general" exception was interposed to the ruling of the Court upon a number of requests to charge.

But there is another and a more serious aspect of this matter. Not only is the inference suggested by counsel for plaintiff in error without foundation in the terms of the record—it appearing that the exceptions were taken to each instruction—but this inference is

untrue in point of fact. The record as to these exceptions is merely a condensation of what actually occurred, but it shows clearly enough that an exception was separately taken to each refusal of the Court to give the specific instruction requested. As matter of fact the six special instructions were all asked separately; they were contained in one instrument on one paper, but each was numbered for the purpose of identification or reference. We cannot conceive it possible that, in view of the terms of the record upon this point, the objection made by counsel for defendants in error will be seriously treated by the Court; but in the event that we should be mistaken in this, we should ask the Court for an opportunity by proper process to bring before it the original instructions asked, with original notes of their disposition and of the separate exceptions taken thereto.

C.

The third objection to this assignment of error is (Br., p. 14) that "the request for such special instruction being equivalent to a demurrer to the evidence it admitted not only the facts stated in the testimony, but also every conclusion which the jury might fairly or reasonably infer therefrom; and the evidence of the liability of the company for the death of the deceased is ample and well supports the verdict of the jury," thus raising the question whether the action of the trial Court in refusing to give the instructions asked for was proper.

Its determination involves a careful examination of the testimony—an examination by no possibility necessary to the decision of the motion to dismiss.

It is to be noted, primarily, and kept in mind, that

the evidence as to the manner of Gentry's death is entirely circumstantial. It is not claimed that there was any witness of the circumstances immediately attending his death. Plaintiffs below contended, and, under the allegations of their petition, of necessity contended, that upon the circumstances as proved the only conclusion that could be drawn was that he was killed by a flat car propelled by an engine in the yards of the railroad company. The only facts directly proved to support this contention are that when last seen he was going towards the company's yard by way of a lonely path he was accustomed to take when going to the engine of which he was the efficient engineer, and that nearly an hour later (Rec., p. 20) his mangled body was found upon one of the tracks in the yard, and also that evidences of its having been run over by the flat car were found upon the trucks of the car and the pilot of the engine propelling it.

We respectfully submit that these facts, even if conceded, are insufficient to prove plaintiff's case. There is nothing whatever in them inconsistent with other conclusions, viz: that deceased was murdered or rendered insensible and his body placed upon the track with intent to hide the crime; or that he was taken suddenly ill and fell upon the track, where his unconscious body was mangled in the way described—such things have happened in other places, doubtless also in Texas; or that he was killed by another train.

Indeed, it may fairly be said that either of these theories is more consistent with the proved facts than is the contention of plaintiffs that he was killed by the flat car, for the testimony shows that deceased was familiar with the yard and with the movement of switching engines therein (Rec., p. 52); that it had been his

habit for years to be on his engine in close proximity to the place where his body was found, every other evening from the time he reached it, shortly after eight o'clock, until he started on the run to Toyah at 9:25 o'clock (Rec., pp. 25, 30); and that the switching engine and flat-car did not pass over the place where the body was found until 8:30 o'clock on the evening when his death occurred (Rec., pp. 22, 23, 24), while his hour for going on duty when in Big Springs was eight o'clock (Rec., pp. 25, 30). There was evidence tending to show that another train had passed over the track when Gentry's body was found after eight o'clock on that evening (Rec., p. 22).

Plaintiffs failed to prove that the death of Gentry was caused by the flat-car running over him, as is alleged in their petition, and for this reason the jury should have been instructed to find for the railway company. Mere proof that defendant was negligent (which we do not admit) will not justify a Court in submitting a case to the jury; nor is proof of negligence even when supplemented with proof that such negligence *might* have caused the injury, sufficient to sustain plaintiffs' case. They must show that the negligence of the railway company *must have been the cause of the injury.*

In Wakelin vs. London and Southwestern Ry. Co., L. R., 12 App. Cas., 41, the action was brought by the widow of a man whose dead body was found on the line of a railway near a level crossing of a pathway, he having been killed by a train which carried the usual headlights, but did not whistle or otherwise give warning of its approach. Defendants admitted that he was killed by the train, but denied negligence and pleaded contributory negligence. No evidence was given of the

circumstances under which deceased got on the line. The jury found for the plaintiff. There was no witness to the accident. *Held*, by the House of Lords, affirming the decision of the Court of Appeals that, even assuming (but without deciding), that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was, therefore, no case to go to the jury, and that the railway company was not liable. Per Lord HALSBURY, L. C.:

"My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if, in the absence of direct proof the circumstances as established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmation of the proposition; *ei qui affirmat, non ei qui negat incumbit probatio.*"

This principle is adhered to by the Supreme Court of Texas.

Missouri Pacific Ry. Co. vs. Porter, 73 Tex., 304 (1889), was a suit by parents for injuries resulting in the death of a son.

Plaintiffs alleged that their son was killed by being run over by plaintiff's train near where the track crossed a public highway, and was caused by defendant's negligence in not ringing a bell or blowing a whistle.

The father testified that when he last saw the son he was walking between the rails of the track with a sack of meal on his head going home, and that he talked with him. This meeting occurred late in the day, and about

an hour and a half before the train passed. Another witness testified he saw the meeting of the father and son, and that it took place on a dirt road running close to and parallel with the track. The road crossed the track at a point south of and beyond this point. The mangled body of the son was found next morning about one hundred and fifty or two hundred yards north of the crossing. Blood was found on the track from fifteen to forty yards north of the crossing. There was no evidence that any other train passed the place on that night.

The Court, per GAINES, J., said:

"The only possible way to construct a theory of the case, which would entitle plaintiffs to recover, is to deduce one presumption from another, and this the law will not permit (Lawson on Pres. Ev., Rule 118, p. 569). Where there is no eye-witness, proof of negligence on part of a railroad company, and of care on part of a person killed at a crossing, the facts may be established by circumstances (Railroad Co. vs. Hall, 61 Pa. St., 361), but the circumstances themselves must be shown by direct evidence, and cannot be inferred from other circumstances. It is not admissible to go into the domain of conjecture and to pile one presumption upon another (Railroad Co. vs. Henrice, 92 Pa. St., 431; U. S. vs. Ross, 92 U. S., 284; Douglass vs. Mitchell, 35 Pa. St., 440).

"There is evidence tending to show negligence in the railroad company in failing to giving a signal upon approaching a crossing where it had been accustomed to ring a bell or blow a whistle. But whether this contributed to the death of Ernest Porter or not, and whether he exercised due care or not, the evidence leaves us wholly in doubt. The case developed by the record leaves the circumstances of his death enveloped in mystery. The testimony fails to show negligence on part of the defendant contributory to the injury. It tends to show negligence on part of the deceased in walking upon the track, and there is nothing but very remote circumstances to rebut this presumption. It appearing that the train did not pass until long after he had time to have

reached home, it would seem that the most plausible theory is that, being overcome with fatigue, he sat down upon the track to rest and unintentionally fell asleep and was in that condition run over and killed. No one saw the accident; the evidence tends to show that the deceased was negligent in walking along the track, and the circumstances directly proved neither showed that the negligence of the company caused the injury or that the deceased's negligence did not contribute to it, and, therefore, the verdict must be set aside. The judgment is reversed and the cause remanded."

The rule upon this subject is announced by this Court in United States vs. Ross, 92 U. S., 281, 283, 284:

"Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evid., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences (Best on Evid., 95). A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption (Douglas vs. Mitchell, 35 Penn. St., 440)."

It thus appears that the question raised by this assignment of error has not only not been decided by

this Court adversely to plaintiff in error, but has been decided in its favor. For this reason the motion to affirm should be denied and the judgment below should ultimately be reversed.

D.

The last objection to the first error assigned (Br., p. 32), is that a plea of contributory negligence, being by way of confession and avoidance, admits the negligence of defendant.

If this were the rule, plaintiffs were under no necessity of introducing any testimony whatever tending to show negligence on the part of defendant, for under this claim none was necessary, negligence being admitted.

While it is undoubtedly true that an allegation of negligence, and a defense of contributory negligence, are oftentimes so closely interwoven in the facts that the testimony offered to support the one bears also upon the other, there is nothing in this fact relieving a plaintiff from establishing the allegations upon which his right of recovery rests. The burden of proof of negligence is upon him. It is the essence of his case. When he has proved a *prima face* case, and not until then, is the defense of contributory negligence, or any other defense, material.

It was aptly said by Lord WATSON in Wakelin vs. London & S. W. Ry. Co., L. R., 12 App. Cas., 41, above referred to :

"In the present case, I think the appellant must fail, because no attempt was made to bring the evidence in support of her allegations *up to the point at which the question of contributory negligence becomes material.*"

In Texas, the rule as to burden of proof of negligence and of contributory negligence, pleaded as a defense, is stated to be as follows :

" We believe the true rule to be as thus stated by an elementary writer : ' No doubt where, in an action for injuries caused by failure of duty on the part of defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff is guilty of such negligence. On the other hand, when the plaintiff's own acts casts upon him the suspicion of negligence, then he must clear such suspicion.' Wharton on Negligence, 426."

Dallas & Wichita Ry. Co. vs. Spicker, 61 Texas, 427, 429.

Under this rule, the defendants in error must choose between the horns of a dilemma. They must either abandon this objection or their case must fall because they have failed to exonerate the deceased from all " suspicion " of contributory negligence.

The Seventh Assignment of Error.

(Rec., p. 90 ; Defts'. Br., p. 42.)

The error here assigned is that the Circuit Court of Appeals erred in affirming the ruling of the Circuit Court in instructing the jury against the objection of defendant, as follows :

" In this case there is no dispute about the following facts : Louis D. Gentry, on the night of the 13th March, 1891 [1890], was run over and killed by a flat car of defendant propelled by a switch engine in its yards at Big Springs, Texas."

The only objection to the exception to this instruction made by defendants in error is that it is " exceedingly hypercritical " (Br., p. 42). We contend

that the instruction as given was exceedingly unjust and improper. It begs the whole question as to the manner of Gentry's death, and assumes that the first important allegation of the petition in this respect was true and not controverted—even by the answer. We admit that the circumstantial evidence strongly tended to show that the body of Gentry was run over by the flat car, but there was no direct evidence that his death was *caused* by his being run over by the flat car, and plaintiffs' allegation that his death was so caused was denied in the answer. If the case could properly be sent to the jury it should have been submitted to them in an impartial manner. The jury is to decide the presumptions arising from circumstantial evidence, not the Court. The Court might, with equal propriety, have inferred from the evidence that Gentry was rendered insensible by a blow on the head and his body placed on the track to conceal the assault, or that he was killed by another train. The injustice to plaintiffs of such a charge would be no greater than is the injustice done defendant by the instruction as given.

The prejudicial effect of this instruction upon the minds of the jury is apparent and requires no comment.

This instruction cannot be justified on the ground that it was the opinion of the Court upon the evidence, which is allowed to be given in the courts of the United States. It is not in form an opinion, nor does it purport to be an opinion. Its language is emphatic and certain—"*There is no dispute*," &c. This Court has expressed its opinion upon an instruction of this kind, thus:

"Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are

established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive province of the jury."

Bank of Leavenworth vs. Hunt, 11 Wall., 391, 394.

"It is not allowable to assume as existing facts not proved, and to ask a direction to the jury upon such assumption. This practice would tend to embarrass and mislead the jury."

Railroad Co. vs. Gladmon, 15 Wall., 401, 409.

The Fourteenth and Sixteenth Assignments of Error.

(Record, pp. 92, 93; Deft.'s Brief, 47, 49).

The same question discussed under the seventh assignment of error was presented in the fourteenth and sixteenth assignments of error on exceptions to the action of the trial Court in permitting witnesses, against the objection of defendant, to testify that Gentry was killed by the flat car, when it was admitted that they were not present when he was killed, and knew nothing whatever of their own knowledge about the matter concerning which they testified so positively.

If it were necessary or proper for the consideration of this motion to pursue the argument upon the twelve other assignments of error, it would additionally appear that the action of the trial Court in refusing to give instructions asked for by the defendant, and in charging the jury, practically took from the jury the consideration of defenses specially pleaded, including the question of contributory negligence, and also the question whether defendant's negligence, if any there

were, was that of a fellow-servant, for which defendant could be held liable.

The Alleged Negligence.

Aside from the errors committed by the trial Court in giving and refusing instructions—which, we submit, we have shown are amply sufficient to require the Court to deny the motion to affirm—a last analysis of the pleadings and evidence will show that, unless the Court can reach the extraordinary conclusion that the use of a road engine with a flat car in front of it for switching purposes, in a yard where railway trains are constantly being made up, is negligence *per se*, the plaintiff cannot recover. A necessary sequence of such a conclusion would be the still more extraordinary rule that it is negligence *per se* to permit a switching engine, in making up trains, to *push* a flat or box car in the yards of the railway company. Obviously, a regulation in compliance with such a rule would be impracticable.

A summary of the evidence may be useful:

The only act of negligence, on the part of the railway Company, complained of, is that on the night when Gentry was killed it was operating a road engine in its yard at Big Springs with a flat car attached in front of it for switching purposes. This usual device was used instead of an ordinary switch engine because the regular switch engine was then in the shops being repaired (Rec., 20, 22, 28, 35, 47, 52). The only differences between a road engine and a switch engine are that a switch engine has no pilot, while a road engine has, and that a road engine has no step in front of it, nor draw-head, both of which are parts of a switch engine (Rec., pp. 23, 25, 27, 28, 30, 38, 39, 46). When a

road engine is used for switching purposes a flat car is coupled in front of it to enable switchmen the more easily to attach other cars to it in the usual manner and without the necessity of handling the heavy pilot-bar which is used for coupling purposes on the road engine (Rec., 52–3, 59, 62), and in order to avoid the danger which would be incurred by persons coupling cars from the pilot. In yards where trains are made up it is undesirable to use a road engine alone for switching purposes, for the reason that the pilot-bar is very heavy, weighing from 60 to 90 pounds (Rec., 52, 61), and in making couplings the switchman would have to lift it up, and would be in danger of being struck by the pilot (Rec., 52, 53, 59, 62). The proof further shows that in switching and making up trains in the yard, even a switch engine is as likely to be pushing a flat car or even a box car in front of it as to be pulling cars (Rec., 21, 26, 29, 31, 36, 39, 42, 47-8, 60). In other words, switching engines, in making up trains in the yard, both push and pull cars coupled to them, so that, even if a switch engine had been in use on the night when Gentry died, an equal probability arises that it would have been pushing a flat car or box car in front of it. The proof further shows that the defendant company had rules which were complied with in every particular in the matter of ringing the bell of the engine while making up trains in the yard (Rec., 22, 23, 24, 53). It further shows that the head-light on the engine was in good condition (Rec., 20, 24, 31, 34, 36, 48), and that the light reflected from it struck the flat car at about its middle, illuminating the forward end (Rec., 20, 23, 24, 25, 27, 28, 30, 31, 32, 34, 48, 52). The evidence clearly shows

that it was not only the custom of the defendant company to use a flat car coupled in front of the road engine for switching purposes when the regular switch engine was being repaired (Rec., 39, 42, 47, 52, 54), but that such was the universal custom of all the roads in Texas and in some of the other States (Rec., 55, 56, 58, 59). Circumstances were proved very strongly tending to show that Gentry was not only well aware of this custom of using a road engine with a flat car in front for switching purposes, but also that he had an opportunity on the very day of his death of seeing the very engine and flat car, by which it was claimed he was killed, then in use for switching purposes (Rec. 21, 26, 31, 34, 37, 52, 56, 60). As has been said, there is no direct evidence whatever that Gentry was killed by the flat car. Yet from these facts alone plaintiffs contend that Gentry met his death solely on account of the use of a flat car attached to a road engine. Testimony was introduced tending to show that the use of a switch engine in the yard is a safer method of switching cars than is the use of a road engine with a flat car thus attached. An examination of the testimony will show that by "safer" all the witnesses meant that a switch engine so used is safer to the *parties engaged in switching*, not that it is safer to other persons otherwise employed in the yard or to the general public (Rec., 21, 23, 24, 25, 28, 31, 33, 34, 37, 38, 40, 47, 54, 56, 58, 59).

We respectfully submit that this proof utterly fails to show any negligence whatever on the part of the railway company, but on the contrary, it shows that in using the road engine and flat car for switching purposes when the regular switching engine was laid up for repairs, the company adopted and used an entirely

proper device, which it was in the habit of using under such circumstances, and such as is customarily used by other railroads under like circumstances; that such use was well known to its employees; that Gentry had every opportunity to know of such use, and in all reasonable probability actually did know it on the very day of his death; that the use of the road engine and flat car was no more dangerous to employees of the railway company not actually employed in switching than was an ordinary switching engine; and that every precaution by way of ringing the bell and illumination was taken to avoid accident.

We submit also that in view of all the testimony as to Gentry's familiarity with the yard and the making up of trains therein, and his opportunities for knowing of the use of the road engine and flat car on the 13th of March, 1890, it is impossible to avoid the conclusion that if his death was not caused by foul means or by sudden illness or some other unknown circumstance, it was due to his own negligence and to no other cause.

Having shown that the writ of error was not sued out for purposes of delay and that questions preserved in the record have not been, by this Court, decided adversely to plaintiff in error and are not frivolous, but worthy of the serious consideration and determination of this Court upon full oral argument, we respectfully submit that the motion to affirm should be denied.

Brief on Motion for Leave to amend Writ of Error.

Plaintiff in error has filed a motion reciting "that it appears from the record in this case (p. 95) that in the writ of error directed to the Honorable the Judges of the United States Court of Appeals for the Fifth Circuit, this cause is described as being 'between the Texas and Pacific Railway Company, plaintiffs in error, and May Gentry and others, defendants in error,' whereas the parties to this cause as defendants in error were and are May Gentry, Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry, as by the said record and by the citation issued on the said writ of error fully appears," and praying "for leave to amend said writ of error by inserting therein after the name of May Gentry, and in lieu of the words 'and others,' the names of Olive Lee Gentry, Thomas M. Gentry and Mary A. Gentry."

The power of this Court to grant this motion is conferred by Section 1005 of the U. S. Revised Statutes, and is conceded by counsel for defendants in error (Brief, p. 8).

The exercise of the power so conferred is left to the discretion of the Court. We have already shown in our brief on the motion to dismiss *(ante*, p 13.*)* that the names of all the defendants in error are set forth in many places in the record. It may be truthfully said that all the names appear in all the places where it is proper to name defendants in error (and in some where it is not necessary to name them all) except in the writ of error. It is apparent that the neglect to name all the defendants in error in the writ was a clerical error or an oversight.

No claim is made that any defendant in error, or other person, has been injured in any way by the omission. All the defendants in error were named in the citation (Rec., p. 96) and have appeared here by counsel.

We submit this motion, confidently believing that it will commend itself to the favorable exercise of the discretion of the Court.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
Counsel for Plaintiff in Error.

FILED
APR 28 1896
JAMES H. MCKENNEY,
CLERK.

No. 15,369.

Supreme Court of the United States.

OCTOBER TERM, 1895.

TERM No. 258.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

MAY GENTRY ET ALS.,
Defendants in Error.

ERROR TO UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

JOHN F. DILLON,
WINSLOW S. PIERCE,
DAVID D. DUNCAN,
For Plaintiff in Error.

C. G. Burgoyne, Walker and Centre Streets, New York.—1896.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 258.

THE TEXAS AND PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

AGAINST

MAY GENTRY, OLIVE LEE GENTRY, THOMAS M. GENTRY and MARY A. GENTRY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

Statement.

This cause was originally instituted in the District Court of Dallas County, in the State of Texas, and was removed by the defendant into the Circuit Court of the United States for the Northern District of Texas, on the ground that said defendant was, and is, a corporation by virtue of the laws of the United States.

It is brought under Title 52 (Articles 2899–2909) of the Civil Statutes of Texas, which relates to actions for

injuries resulting in death, to recover damages for the death of Louis D. Gentry.

These sections of the Statute of Texas are reprinted in the APPENDIX hereto.

The plaintiffs are May Gentry, his widow, Olive Lee Gentry and Thomas M. Gentry, their minor children, and Mary A. Gentry, his mother, all of whom are included in the terms of Article 2903, specifying for whose benefit such an action may be brought.

In their "Seconded Amended and Substituted Original Petition" (Record, pp. 1–6) plaintiffs allege that May Gentry, Olive Lee Gentry and Thomas M. Gentry resided in the State of Texas, and Mary A. Gentry in the State of Missouri; and that the defendant The Texas and Pacific Railway Company "is a corporation duly created and acting as such under and by virtue of the laws of the Congress of the United States of America;" that Louis D. Gentry, now deceased, was in the employ of the defendant as an engineer on its regular train running between Big Springs and Toyah, in the State of Texas; that he brought his train into Big Springs from Toyah at about six o'clock in the morning of March 13th, 1890, was off duty during the day, and that his schedule time for going on duty again was at twenty-five minutes past nine in the evening of said day; that at fifteen minutes past eight o'clock in the evening of said day he left his residence, on the south side of defendant's track at Big Springs, for the purpose of taking charge of his engine; that said engine was standing at its usual and customary place on the switch on the north side of the yard of the defendant, and that while crossing said yard said Gentry, before going on duty, through the

carelessness of the defendant's agents, employees and servants, without any fault or negligence on his part, was run down and killed by a flat car coupled in front of a locomotive which was being used by defendant for switching purposes in said yard. Plaintiffs also alleged that defendant had carelessly and negligently failed to place any headlight, lantern or lights of any kind to give warning of the dangerous character of said flat car and locomotive, and had also failed to sound the whistle or ring the bell of said locomotive when approaching the pathway or crossing in said yard, and also negligently failed to have any headlight or other light on said flat car or to have the headlight of said locomotive so arranged that the rays of light therefrom should be reflected down upon said flat car; that the same was so arranged that the rays of light passed entirely over and beyond said flat car and left it in complete darkness and obscurity; that said Gentry, not knowing that said engine and flat car were being used for switching purposes, and not being able to see said flat car, and being blinded by said headlight on the engine, and not hearing the whistle or bell of the locomotive, without fault or negligence on his part, while in the act of crossing the main track in the said yard, was run over by said flat car and killed. That the engine used by the defendant for switching purposes on said occasion was an ordinary road engine with pilot in front, and was unsuitable and unfit for such purpose, and that in order to make it useful for such purpose the defendant coupled in front of it an ordinary flat car. That Gentry did not know of the use of said engine and flat car for switching purposes, nor of the dangerous character of such appliance, but that defendant

knew thereof and persisted in using the same, instead of a regular switching engine for such purpose.

DEFENDANT ANSWERED (Rec., pp. 10–12) excepting generally to the petition; pleaded the general issue, and by special answer, alleged that the death of said Gentry was contributed to and caused by his own negligence and carelessness in going in and upon defendant's yard and track and failing to exercise his sense of seeing and hearing, and in placing himself in a position of danger without observing proper care or regard to his own safety, and that but for such negligence on his part his death would not have occurred. Defendant also alleged that the regular switch engine used in its yards at Big Springs, had, shortly before the time mentioned in plaintiff's petition, become out of repair, and that it was necessary to discontinue the use thereof temporarily in order to repair it. That one switch engine was amply sufficient to do the work of defendant in said yard, and that while said switch engine was unavoidably being repaired and was temporarily disabled for use a road engine was used for switching purposes, and that in order to lessen the danger to switchmen and other employees working therewith, a flat car was coupled to the front of said engine while being used for switching purposes. That the temporary use of a road engine and flat car so connected, under such circumstances, is usual, customary and entirely proper, and is well known to all persons engaged in railway service, and especially to locomotive engineers; that such use and arrangement, and

the reason and effect thereof, were well known to said Gentry; that the engine and car so used were in all respects proper for the purposes for which they were used; were in good condition, properly equipped with lights, bell and whistle and other appliances for safety, and that defendant was not guilty of negligence in the premises.

Defendant also alleged that, if the death of Gentry was caused, or in any way contributed to, by its agents or employees, such negligence was that of a fellow servant or servants of said Gentry, being in the same general employment and service, and under the same management and control, and in the same department in which the said Gentry was employed, for which the said defendant is not liable.

Plaintiffs recovered a VERDICT for the sum of $10,166.66, apportioned among the plaintiffs, as required by the statute of Texas, Article 2909 (quoted in Appendix hereto), as follows: To May Gentry, $4,166.66; Olive Lee Gentry, $2,500; Thomas M. Gentry, $2,500, and Mary A. Gentry, $1,000 (Rec., p. 12).

THE JUDGMENT, which was entered January 31, 1893, recited the verdict in full and proceeded (Record, pp. 12, 13) "It is therefore considered by the Court, and it is so ordered and adjudged that" May Gentry recover from defendant $4,166.66, with interest, &c., "for which let execution issue." "It is further considered," &c., that Olive Lee Gentry recover from

defendant $2,500 with interest, &c., "for which let execution issue." Similar dispositions are made in favor of Thomas Lee Gentry for $2,500, and Mary A. Gentry for $1,000, and provision is made in each case for the issue of execution.

It was further ordered that plaintiffs recover their costs from defendant "for which execution may also issue;" and also that all officers of the court and parties entitled to costs recover from plaintiffs and the sureties on their cost bond the costs of both parties "for which execution may also issue."

A WRIT OF ERROR was sued out from the United States Circuit Court of Appeals, for the Fifth Circuit, which Court on June 27, 1893, being divided in opinion, pronounced judgment (Record, p. 85) affirming the judgment of the Circuit Court and adjudging that the plaintiff in error and the sureties on its writ of error bond "be condemned to pay the costs of this cause in this court, for which execution may be issued out of said Circuit Court."

The opinion of the Circuit Court of Appeals is as follows:

"*Per Curiam:* The Judges being divided in opinion, the judgment of the Circuit Court is necessarily affirmed. The case being one in which the judgment of the Circuit Court of Appeals is not final, it is not deemed necessary to order a reargument before a full bench, nor proper to certify questions to the Supreme Court for instructions. Judgment affirmed with costs" (57 Fed. Rep., 422).

From the judgment so rendered the case has been brought by writ of error to this Court.

After the transcript was filed in this court defendants in error submitted motions to dismiss and to affirm.

The first motion to dismiss was made on behalf of Mary A. Gentry, the mother of deceased, on the ground that her cause of action is separate and distinct from that of the other defendants in error; that there was a separate verdict and a separate judgment entered in her favor, and that as the judgment did not exceed $1,000 besides costs, this Court has no jurisdiction to review her judgment.

The second motion to dismiss was made on behalf of all the defendants in error, on the ground that the judgment or order of the United States Circuit Court of Appeals for the Fifth Circuit, simply affirming the judgment of the Circuit Court for the Northern District of Texas, and condemning plaintiff in error and the sureties on its writ of error bond to pay the costs on appeal, is not such a final judgment as can be reviewed by this Court.

The third motion to dismiss was based on an error in the writ of error, which failed to recite the names of all the defendants in error. This defect in the writ of error has been cured by amendment, by leave of this Court granted on motion of the plaintiff in error, and cannot now be insisted upon.

The several motions to dismiss were duly submitted at the October Term, 1893, and hearing thereon adjourned until the hearing on the merits.

ASSIGNMENTS OF ERROR.

The assignments of error which follow are found in the Record, pages 69–78. We call attention to them here because each assignment contains a succinct and terse statement of the grounds on which it rests, which grounds we have, for sake of brevity, not always repeated in this brief.

The said assignments of error are as follows:

I.

The circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are instructed that plaintiffs in this case have failed to prove their case and have shown no right to recover. You are therefore instructed to find for the defendant.

Because plaintiffs sue for the death of L. D. Gentry, an employé of defendant (locomotive engineer), residing at Big Springs, Texas, on account of his being run over and killed by a road engine and flat car being used for switching purposes at night, with a head-light burning on the engine and without a light or lights on the far end of the flat car from the engine to warn employés passing through the yard, the said engine and flat car being used in defendant's yard at Big Springs, Texas, instead of a regular switch engine, for the reason all the evidence introduced upon the trial (1) failed to show that he was killed by said engine and flat car, (2) and does show that if he was killed by the same that it was by reason of said L. D. Gentry's carelessness in stepping on defendant's track in front of the same, when, if he had looked, he could have seen the same and avoided the accident; (3) and further shows that defendant's regular switch engine was temporarily disabled and was in the shop at Big Springs, being repaired; that under such circumstances it was proper and customary, as was known to said L. D. Gentry or, by the exercise of ordinary care, could have been known to him, for defendant to use for switching

purposes said engine and flat car; (4) and that if the accident resulting in the death of said L. D. Gentry was caused from the fact that there was not a light or lights on the flat car at the time, it is claimed L. D. Gentry was killed by the engine and flat car; that it was the duty of the employés operating said engine and flat car to have had a light or lights on the flat car, and that such employés were fellow-servants of said L. D. Gentry, and that on account of any negligence on their part in failing to so light said car defendant is not liable." The evidence wholly fails to establish any liability whatever on the part of defendant for and on account of the death of said L. D. Gentry, and the jury should have been instructed to find a verdict for the defendant.

II.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are instructed that it is the duty of an employé or any other person about to cross a railroad track to look and listen for passing engines, cars, or trains, to ascertain whether or not the same are approaching, before going upon the track, and if the party fails to exercise such care he cannot recover. You are, therefore, instructed that if the deceased, L. D. Gentry, by looking or listening, could have known of the approach of the engine and car, and in time to have kept off the track and prevented the injury to himself, and he failed to do so, you will find for the defendant, for the reason all the evidence clearly shows that the end of the flat car which plaintiffs claim struck and run over L. D. Gentry was illuminated, and clearly shown by the head-light burning on the engine, and that the bell of the engine was kept constantly ringing while switching in the yard, and if said L. D. Gentry had looked or listened before stepping upon the track in front of said engine and flat car he would have seen the same and have known of its approach and could have avoided the accident."

III.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit :

" You are instructed that one who enters into employment attended with risk of injury of which such employé has notice, or by reasonable care may have noticed, cannot recover compensation from the party employing him if by exposure to such risk he is injured ; that it is the duty of such employé, if he is subjected to danger on account of defective machinery, to notify the party employing him thereof, and unless the party employing him promises to remove such danger, if such employé continues in such service, he assumes the risk occasioned on account of such exposure and risk. The evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known, of the engine and flat car being used for switching purposes. It is not claimed that he protested against the same ; hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even if the same were defective appliances, for the reason that the evidence shows that L. D. Gentry knew, or if he had exercised ordinary care would have known, that the engine and flat car was being used for switching purposes, and it is not claimed he protested against the same ; hence he assumed the risk incident to the use of such engine and flat car in defendant's yard, even should it appear that the same were defective appliances.

" The uncontradicted evidence established the fact that it was the custom of the Texas & Pacific Railway Company, and had been for years prior to Gentry's death, to use a road engine with flat car attached to the front of the same for switching when the regular switch engine was temporarily out of repair, and, this fact being established, Gentry contracted in regard to same and it was one of the natural risks incident to his employment."

IV.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the

northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit :

" You are instructed that the deceased, L. D. Gentry, was at the time of his death a fellow-servant with the engineer and fireman and the switchman working with engine No. 68 at the time, and of the yard-master working in the yard at the time said Gentry was killed, and if the death of said Gentry was caused by the negligence of either of said persons in failing to place a light or lights on said flat car or othewise, such negligence would be that of a fellow-servant with said Gentry, for which defendant is not liable, and if you find from the evidence that his death was caused by the negligence of such person or persons you will return a verdict in favor of defendant unless you find from the other charges given you that the same was on account of defective machinery."

For the reason the jury should have been instructed that if they believed from the evidence that plaintiffs would not be entitled to recover on account of the death of said L. D. Gentry if a light or lights had been placed on said platform that defendant would not be liable herein, for the reason that it would have been the fault or negligence of said L. D. Gentry's fellow-servant in failing to have said flat car lighted, if it should have been lighted while they were operating the same, on account of which fault or negligence defendant could not be held liable.

V.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit :

" The acts of negligence on the part of defendant relied on by the plaintiffs are (1) the use of a road engine with a flat car in front for switching purposes without having taken the precaution to place lights on the flat car, and (2) also in the use of a head-light on said engine so constructed that the rays of light from it reflected over and beyond the flat car, so that the position of the flat car could not be seen by the employés of defendant working in defendant's yard and

using its track at Big Springs, where such switching was being done, and (3) in not having the said yard so lighted at places therein were defendant's employés were accustomed to cross the track in the pursuit of their employment.

You are instructed that, as shown by the evidence, (1) prior to L. D. Gentry's employment by defendant and up to the time of his death said yard was not so lighted, so that in accepting said employment said Gentry assumed the risk incident to working and being in said yard as such employé without its being so lighted; (2) that said head-light illuminated said flat car about half way furthest from the engine, so that any employé by looking before going on defendant's track in said yard could see and locate said flat car as well as said engine and keep out of the way, as it was his duty to do; (3) that said engine and flat—*was* being used temporarily for switching purposes, the regular switch engine being in the shops for repairs, the flat car being attached to the engine for the safety of switchmen using the same; that the head-light, reflecting its rays for several hundred yards, was attached to the front of the engine and shed its light over and made apparent the far end of the flat car and illuminated on beyond upon the track, so that any one looking and exercising proper care before going on the track could see the same so as to avoid being run over; that the use of said engine and flat car, under the existing circumstances, was not negligence towards said Gentry; wherefore no negligence has been shown on the part of the defendant; hence you will find a verdict for the defendant."

For the reason that plaintiff's alleged cause of action and the evidence introduced upon the trial was correctly stated therein, and from the same the defendant is in no wise liable for damages on account of the death of said L. D. Gentry.

VI.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in failing and refusing to give to the jury the following special instruction asked by plaintiff in error, to wit:

"You are further instructed (1) that if you find and

believe from the evidence that the deceased, L. D. Gentry knew or could by the exercise of care have known or become aware of the approaching train and could by the exercise of ordinary care and diligence either kept off of the track or gotten off of the same in time to have prevented the accident and he failed to use such ordinary care and diligence, then you will find for the defendant; you are instructed by the term 'ordinary care' is meant such care or diligence as a prudent man would exercise under like circumstances; (2) you are instructed that the evidence in this case shows that L. D. Gentry, if he was run over by said flat car and engine, stepped on defendant's track just in front of same when if he had exercised proper care in looking for approaching engines, cars or trains before going on the track he would have seen the same and could have avoided the accident; that in so going upon the track he was guilty of contributory negligence and plaintiffs are not entitled to recover herein; hence you will find a verdict for the defendant," for the reason the evidence conclusively shows that if said L. D. Gentry had looked before stepping upon the track that he would have known of the approaching engine and car and by the exercise of ordinary care could have prevented the accident resulting in his death. The evidence conclusively shows that if said L. D. Gentry was killed by said engine and flat car it was on account of his own contributory negligence in failing to look out for danger before stepping upon the track.

VII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 1 of his charge as follows:

"In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th of March, 1891, was run over and killed by a flat car of defendant propelled by a switch-engine in its yards at Big Springs, Texas," because the charge assumes as an uncontroverted fact and instructs the jury that there is no dispute in this case as to L. D. Gentry's having been run over and killed by a flat car of defendant propelled by the engine in its yard at Big Springs, when this was a controverted and material fact and was wholly unes-

tablished by the plaintiffs, and this fact should have been submitted to the jury for their conclusion from the evidence.

VIII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 2 of his charge as follows:

"Louis D. Gentry, deceased, assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing said track for any other purpose."

Because the charge failed to instruct the jury as to what degree of care was required of him. It failed to instruct the jury that it was the duty of deceased to look and listen for passing engines, cars and trains before going upon the track, as requested by defendant in its special instruction. It failed to instruct the jury that if he saw the train or by the exercise of ordinary care could have seen the same and attempted to cross the track and stepped on the track just in front of the car that his own contributory negligence would prevent a recovery. The charge merely instructs the jury that the deceased assumed the risk naturally incident to crossing the track of defendant to reach his car or for any other purpose.

IX.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in confining the jury by paragraph 4 of its charge to evidence only as to the custom of the particular road, the defendant, in its use of a road engine and flat car for switching purposes, for the reason the evidence shows (which evidence was submitted without objection) that the custom of using such appliances existed on many other roads in and out of Texas, and that the use of the same was customary and usual and was in nowise negligence.

X.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 5 of his charge as follows:

"A corporation is liable in damages to its employé who is injured by the use of defective machinery or machinery not adapted to the purpose for which it is used. The master, however, is not responsible if the employé had full knowledge of such defect or want of adaptibility of the machinery used for the purposes for which it is used," for the reason the charge only exonerates the defendant from liability in event said L. D. Gentry had full knowledge of the defect or want of adaptibility of the machinery used, when, in fact, the servant cannot recover of the master when the former knew or by the exercise of ordinary care could have known of the defective machinery.

XI.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in charging the jury in paragraph 3 of his charge that if the machinery was defective and unsafe by reason of whether the light from the head-light struck the flat car and track on the road or from other defects disclosed from the evidence and the same occasioned the death of said L. D. Gentry the defendant would be liable for the reason that, as charged in paragraph 6 by the court, L. D. Gentry was a fellow-servant of the employés operating the machinery used for switching, and if his death was caused by a defect caused from said employés failing to place one of their lanterns on the far end of the flat car from the engine, which the jury could conclude was embraced in "other defects disclosed by the evidence," and defendant would not be liable on account of such defects.

XII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for

the northern district of Texas in giving to the jury special instruction requested by plaintiffs as follows:

"The law does not exact of an employé the use of diligence in ascertaining defects in the appliances or instruments furnished by railroad companies, but charges him with knowledge only of such as are open to his observation; beyond that he has a right to presume without inquiry or investigation that his employer has discharged its duty of furnishing safe and proper instruments and appliances," because the defects, if any existed in said engine and flat car, so far as the use of same was dangerous to said L. D. Gentry, were patent defects, and it is the duty of an employé to use ordinary care to observe patent defects, and the instruction was incorrect.

XIII.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in rendering the judgment upon the verdict of the jury, for the reason that the same was contrary to the charge of the court in the 6th paragraph of said charge, which instructed the jury as follows:

"L. D. Gentry was a fellow-servant of the employés of the defendant operating the switching train that killed him, and defendant is, therefore, not responsible for any negligence that caused his death, but if responsible at all must be under the third and fifth charges above," for that if L. D. Gentry was killed by the engine and flat car, which is not admitted, and if the same did not result from his own negligence, which is charged, it resulted from the negligence of said employés operating said engine and flat car in failing to put one of their lanterns on the front end of the flat car furthest from the engine when moving about in the yard; hence the verdict and judgment should have been for the defendant.

XIV.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in admitting in evidence,

over the objection of defendant, the testimony of the witness Earnest Harrison, as follows:

"I think he, L. D. Gentry, was killed while walking across the track from his home to the engine," because said witness was not present when L. D. Gentry was killed and did not see or know how he met his death, as shown by the witness' evidence; hence the statement objected to was a mere guess and inadmissible.

XV.

The said circuit court of appeals erred in its judgment affirming the judgment of the circuit court for the northern district of Texas in admitting, over the objection of defendant, the evidence of the witness Earnest Harrison, as follows:

"I have never in all my life seen a head-light placed on a flat car, but I have frequently seen a white lantern so placed at the furthest end from the engine, and saw it done many times at Big Springs," because such evidence was inadmissible, not being responsive to the interrogatory, which was as follows:

7th cross-interrogatory. If, in answer to 7th direct interrogatory, you say that a head-light placed on the front end of a flat car furthest from the engine referred to would conduce to safety, please state if it is not a fact that in all the experience of your life you have never seen a head-light fastened on the front end of a flat car which was coupled to a road engine while used for switching purposes. If you ever saw it please state when and where, upon what road, and under whose supervision. Have you seen it more than once? If so, please specify each time and place where you saw it.

Defendant further objected for the reason that the witness does not show when and where he saw such white lantern so placed, whether on this car or some other car or whether before or after this accident.

XVI.

The said circuit court of appeals erred in its judgment affirming the judgment of the Circuit Court for the northern district of Texas in admitting, over the objection of defendant, the testimony of Thomas A. Gentry, as follows:

"He, L. D. Gentry, was killed by being run over by a flat car attached to and ahead of engine No. 6, which was being used for a switch-engine in Big Springs, T. & P. Railway yards," because the witness was not present when L. D. Gentry was killed and did not see or know how he met his death, as shown by the witness' evidence; hence the statement objected to was a mere guess and inadmissible.

ARGUMENT.

As to the jurisdiction.

A.

As to the Amount in Controversy.

The plaintiff Mary A. Gentry, the mother of deceased, to whom $1,000 of the verdict of $10,166.66 was apportioned by the jury, has moved to dismiss the writ of error so far as she is concerned for want of jurisdiction, claiming that her cause of action is separate and distinct from that of her co-defendants in error, and that a separate verdict was found and a separate judgment entered in the Circuit Court for $1,000 in her favor, which sum is not sufficient under the Act of March 3d, 1891, to give this Court jurisdiction.

Two questions are presented by this motion.

(1) Was the cause of action of the mother of the deceased separate and distinct from that of his widow and children?

Under the Texas statute, clearly not (see APPENDIX hereto for Texas statute).

We respectfully submit that whether or not Mary A. Gentry has any right to an individual judgment, or whether her cause of action is different in its nature from that of the other defendants in error, is not now material or relevant, because, as a fact, she has joined them to enforce the right of action given to all of them by the statute of Texas. They all seek to recover rights conferred by that statute and have pursued the remedy provided in the statute. Her rights are the same as those of the other plaintiffs, and she has no others in an action brought under the statute.

(2) Was the judgment of the Circuit Court (Record, pp. 12, 13) one judgment, or did it comprise four separate judgments for damages, one of which was in favor of Mary A. Gentry and two others for costs?

In discussing this motion of Mary A. Gentry, her counsel have assumed what they elsewhere deny (as we shall hereafter see), that this Court is called upon to review the action of the Circuit Court, and not that merely of the Circuit Court of Appeals.

This assumption is probably made to escape the decision of this Court in *Zeckendorf vs. Johnson, 123 U. S., 617*, which was an appeal from the Supreme Court of a Territory affirming the judgment of an inferior Court. It was there held—the Court speaking by CHIEF-JUSTICE WAITE:

"The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the Supreme Court of the Territory, and not at the time of the judgment of the District Court. Adding the interest to the judgment of the District Court until the date of that of the Supreme Court, as we must for the purpose of determining our jurisdiction (*The Patapsco, 12 Wall., 451; N. Y. Elevated Railroad vs. Fifth National Bank, 118 U. S., 608*), we find that the amount

due at the time of the judgment of the Supreme Court was considerably more than $5,000. The motion to dismiss is therefore denied."

Assuming, however, with the learned counsel for the defendant, that this Court will pass upon the proceedings of the trial Court without reference to the action of the Court of Appeals, we proceed to discuss the question whether the record shows a separate judgment in favor of Mary A. Gentry.

Article 1337 of the Civil Statutes of Texas provides that "only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law."

It becomes necessary, therefore, to inquire whether in this cause any special provision has been made by law for more than one judgment.

An examination of the statutes (reprinted in APPENDIX hereto) will compel the conclusion that but one recovery for injuries resulting in death is contemplated or provided for. Sections 2899, 2900 which create the liability create but *a single liability* on the part of the alleged wrongdoer. Nearly every article refers to "an action" or "the action," and nowhere is more than one action authorized or referred to.

Article 2903 is as follows:

"ART. 2903. *For whose benefit action brought.* The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the debts of the deceased."

By Article 2904 it is provided that "the action may be brought by all of the parties interested, or by any one of them for the benefit of all."

Article 2905 makes it the duty of the personal representative of the deceased to "commence and prosecute the action" in case the parties entitled to its benefit fail to do so within three months after the death of the deceased.

Article 2906. "The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives." This section also provides that, in case of the death of a sole plaintiff, "some one or more of the parties entitled to the money recovered may, by order of the Court, be made plaintiff, and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled."

But the right of any one plaintiff to a separate judgment, if any exists, is founded upon Article 2909, as follows:

"ARTICLE 2909. *Damages apportioned by jury.* The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict."

A reasonable construction of this language necessitates the conclusion that it contemplates but one recovery of damages and one judgment for the *entire* injury. The liability of the tort feasor is single and the judgment must correspond with the cause of action and the liability and be for the single liability.

The use of the word "*divided*" is conclusive of the question. Units only are contemplated when division is made. The same argument applies to the use of the word "*shares*" in the last line of the article. Shares of what? Of several judgments? This would be an

unnatural and strained construction of the language of the statute, especially in view of the other provision of law that "only one final judgment shall be rendered in any cause, except where it is otherwise specially provided by law" (Art. 1337). Certainly more than one judgment is not "*specially provided*" in the statute under which this action was brought.

This conclusion is further evident from the power given to the jury to give such damages "as they may think *proportioned to the injury* resulting from such death" as well as from the further provision that the amount recovered shall be "divided among the persons *entitled to the benefit of the action*, or such of them as shall then be alive"—not confining such division to actual plaintiffs. It has been so held in Texas.

Railway Co. vs. Moore, 49 Tex., 31.
Railroad Co. vs. La Gierse, 51 Tex., 189.

If the defendants' contention is correct a case might easily arise in which the trial Court would be compelled to pronounce a separate judgment in favor of a stranger to the record.

We respectfully submit that there is nothing whatever in this article, standing by itself, justifying the entry of a separate judgment in favor of any one of several persons entitled under the act to the benefit of the action; and that when considered in connection with the other articles of the act the conclusion is irresistible that but one judgment was contemplated and provided for, the proceeds whereof are to be "divided" among the several beneficiaries in the proportions designated by the jury.

This conclusion is not in conflict with the ruling in Railway Co. vs. Moore, 49 Texas, 31, where it was

held that "the judgment should award to each of the parties for whose benefit the action is brought the *share* as found and directed by the jury," and that where "the judgment fails to divide the damages assessed by the jury among the parties as directed by the statute, it is error." But one judgment is suggested by these cases which, however, must direct how the amount recovered shall be divided. Careful examination of the decisions of Texas Courts has failed to disclose any case where separate judgments were entered under this statute.

Any other theory will lead to pronounced injustice, for if separate judgments are entered in favor of the several plaintiffs they will have precedence according to the order of their entry or according to the order of the levy of executions, in which case it would be possible that the plaintiff whose good fortune placed his name at the head of the list of plaintiffs or the plaintiff whose superior sagacity and celerity enabled him to issue the first execution, might secure to himself all the property of a defendant to the exclusion of the others; and this might be the result of a proceeding provided by statute for the benefit of all persons interested.

Viewing the contention of this defendant from another point it may happen that a jury which finds a verdict for $10,000 against a defendant, under this statute, may deprive him of all possibility of a review by this Court by apportioning $1,000 to each of ten plaintiffs.

Again, Article 2909 provides that "the amount so recovered shall be divided among the persons entitled to the benefits of the action or such of them as shall then be alive." No reference is made here or in Article 2903, to representatives of a deceased bene-

ficiary. *Quære;* if a beneficiary dies after verdict and before judgment what becomes of the share to which he would be entitled, if alive, in case, as defendant contends, each plaintiff has an interest in his separate judgment only?

It is evident that the intent and purpose of the statute can only be realized by one judgment for the benefit of all the plaintiffs, the amount recovered thereby to be divided among them in the proportions designated by the jury. The judgment entered in this cause must be so construed and treated; otherwise the provisions of the statute establishing the rights of plaintiffs will be violated.

The rule invoked by counsel for defendants in error that "distinct judgments in favor of or against distinct parties, though contained in the same record, cannot be joined to give this Court jurisdiction" (Brief, on motions to dismiss, p. 3) is not applicable to this case. In the case at bar the Statute of Texas gave a right of recovery in one action to all of the plaintiffs (Art. 2903), and authorized the jury (Art. 2909) to "give such damages as they may think *proportioned to the injury* resulting from such death." All of these plaintiffs have a common right in the recovery, but their several shares are apportioned by the jury. Under these circumstances the rule applicable as to the jurisdictional amount is that pronounced in Shields vs. Thomas, 17 How., 3. In that case a court in Kentucky had rendered a decree in favor of the representatives of a deceased person, apportioning to each his share. They united in a bill in equity brought in a court in Iowa, where defendant resided, to enforce the decree rendered in the Kentucky Court.

Chief-Justice TANEY said (pp. 4, 5):

"The whole amount recovered against Shields, in the proceedings in Iowa, exceeds $2,000; but the sum allotted to each representative who joined in the bill was less; and the motion is made to dismiss, upon the ground that the sum due to each complainant is severally and specifically decreed to him, and that the amount thus decreed is the sum in controversy between each representative and the appellant, and not the whole amount for which he has been held liable; and if this view of the matter in controversy be correct, the sum is undoubtedly below the jurisdiction of the Court, and the appeal must be dismissed.

"But the Court think the matter in controversy in the Kentucky court was the sum due to the representatives of the deceased collectively, and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the State. They all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in in which they were to share, the dispute was among themselves, and not with him.

* * * * * *

"This being the controversy in Kentucky, the decree of that Court, apportioning the sum recovered among the several representatives, does not alter its character when renewed in Iowa. So far as the appellant is concerned, the entire sum found due by the Kentucky Court is in dispute. He disputes the validity of that decree, and denies his obligation to pay any part of the money. And if the appellees maintain their bill, he will be made liable to pay the whole amount decreed to them. This is the controversy on his part; and the amount exceeds $2,000. We think the Court, therefore, has jurisdiction on the appeal."

The rule thus announced was approved by Chief-Justice WAITE in *Ex parte* Baltimore & Ohio Railroad Co., 106 U. S., 5.

For these reasons we submit that the motion of Mary A. Gentry should be denied.

B.

The Judgment of the Circuit Court of Appeals is a final judgment.

The second motion to dismiss was made on behalf of all the defendants in error on the ground that this Court has no jurisdiction of the cause because the judgment of the Circuit Court of Appeals, to review which this writ of error is sued out, is not such a final judgment as can be reviewed by this Court.

In discussing this motion counsel for defendants in error in their brief on the motions to dismiss with some elaboration, maintain the proposition that the judgment here in question is that of the Circuit Court of Appeals. This we do not dispute. Objection was made, however, to the jurisdiction of this Court to review the judgment of affirmance entered by the Circuit Court of Appeals on three grounds which we discuss in the order in which they were made:

(a) It was claimed that the judgment of affirmance, without specifying the sum for which it is rendered, is not a final judgment from which a writ of error will lie. To sustain this point counsel cite four cases, three of which are appeals from the Circuit Court in admiralty.

In admiralty cases an appeal from the District Court vacates its decree, and a new trial is had and a new decree entered in the Circuit Court. A simple affirmance by the Circuit Court is, therefore, not proper.

The Lucille, 19 Wall., 73.

In the fourth case, Wheeler vs. Harris, 13 Wall., 51, two decrees were rendered below, one affirming a judgment of an inferior Court with costs "to be taxed,"

and another also affirming the judgment of the inferior court and adjudging a fixed sum for costs. Appeals were taken from both decrees.

This Court selected the latter as a final judgment, but said: "It may be that the first appeal was from a decree which might be taken as final if the second decree had not been rendered."

What is a final judgment within the meaning of the statute authorizing writs of error from this Court has been definitely determined.

In Mower vs. Fletcher, 114 U. S., 127, a writ was issued from this Court to the Supreme Court of California, which had rendered a judgment that the judgment of an inferior Court "be and the same is hereby reversed, with directions to the Superior Court of Los Angeles County to enter judgment upon the findings for plaintiff, as prayed for in the complaint."

Held to be a *final* judgment. WAITE, C. J.:

"That judgment is final for the purposes of a writ of error to this Court, which terminates the litigation between the parties on the merits of the case, so that if there should be an affirmance here the Court below would have nothing to do but execute the judgment it had already rendered (Bostwick vs. Brinkerhoff, 106 U. S., 3."

(b) It was further claimed that a final judgment from which a writ of error will lie must be one which authorizes the issuance of execution to enforce it, either by the Court which renders it, or by the Court which is authorized to issue the execution.

Admitting in the fullest sense the correctness of this test, it is obvious enough that it is met by the form as well as the legal effect of the judgment of the Circuit Court of Appeals. That judgment affirmed the judg-

ment below. The judgment below authorized the issue of execution, and was affirmed with that effect. The judgment of the Court of Appeals also included a provision for execution for costs in that Court, such execution being the only execution unprovided for in the judgment affirmed.

The cases cited by counsel for defendants in error in their brief on the motions to dismiss are wholly pointless. The objection is disposed of by Mower vs. Fletcher, 114 U. S., 127, above cited and quoted from. If the objection as made were tenable, it would invalidate a large proportion of the judgments of this Court.

(c) It was also claimed that this judgment is not final, because it fails to dispose of the case as to one or more of the parties. Cases from the Supreme Court of Texas are cited to sustain this proposition. We respectfully submit that this Court, and not the Courts of the State of Texas, will decide what is a final judgment, to correct which it will issue its writ of error to the Circuit Court of Appeals.

In order to make this point applicable to the case at bar, counsel for defendants in error are compelled to contend (Brief on motions to dismiss, p. 7) that the sureties on the supersedeas bond, given on error from the Circuit Court to the Circuit Court of Appeals, are parties; and that "defendants in error were entitled to a judgment giving them the benefit of the additional security to protect them against the hazard of delay."

The remedy for breach of a supersedeas bond is by an action upon it. No judgment can be rendered against the sureties upon it until it appears that its conditions have been broken.

This Court has had before it many cases brought to enforce the conditions of such bonds.

Ives vs. Bank, 12 How., 159.
Sessions vs. Pintard, 18 How., 106.
Babbitt vs. Finn, 101 U. S., 7.

(d) The Circuit Court of Appeals for the Fifth Circuit *assumed that this Court had jurisdiction* to review its judgment, and for that reason did not deem it "necessary to order a re-argument before a full bench, nor proper to certify questions to the Supreme Court for instructions" (Opinion in this case, 57 Fed. Rep., 422; 6 C. C. A., 413).

As to the Merits.

Plaintiffs alleged in their petition (Rec., p. 3) that Gentry was "run down and killed by a flat car coupled in front of a locomotive that was being used by the defendant for switching purposes;" that the flat car and locomotive were unskillfully, carelessly and negligently constructed, handled, operated and propelled by defendant, and that he was killed "without any fault or negligence on his part" (Rec., p. 4). Defendant demurred to the petition as being insufficient in law, pleaded a general denial and special defenses of contributory negligence of deceased in failing to exercise his senses of seeing and hearing, and that the negligence of defendant, if any, was that of a fellow servant of said Gentry (Rec., pp. 10, 11).

ment below. The judgment below authorized the issue of execution, and was affirmed with that effect. The judgment of the Court of Appeals also included a provision for execution for costs in that Court, such execution being the only execution unprovided for in the judgment affirmed.

The cases cited by counsel for defendants in error in their brief on the motions to dismiss are wholly pointless. The objection is disposed of by Mower vs. Fletcher, 114 U. S., 127, above cited and quoted from. If the objection as made were tenable, it would invalidate a large proportion of the judgments of this Court.

(c) It was also claimed that this judgment is not final, because it fails to dispose of the case as to one or more of the parties. Cases from the Supreme Court of Texas are cited to sustain this proposition. We respectfully submit that this Court, and not the Courts of the State of Texas, will decide what is a final judgment, to correct which it will issue its writ of error to the Circuit Court of Appeals.

In order to make this point applicable to the case at bar, counsel for defendants in error are compelled to contend (Brief on motions to dismiss, p. 7) that the sureties on the supersedeas bond, given on error from the Circuit Court to the Circuit Court of Appeals, are parties; and that "defendants in error were entitled to a judgment giving them the benefit of the additional security to protect them against the hazard of delay."

The remedy for breach of a supersedeas bond is by an action upon it. No judgment can be rendered against the sureties upon it until it appears that its conditions have been broken.

This Court has had before it many cases brought to enforce the conditions of such bonds.

Ives vs. Bank, 12 How., 159.
Sessions vs. Pintard, 18 How., 106.
Babbitt vs. Finn, 101 U. S., 7.

(d) The Circuit Court of Appeals for the Fifth Circuit *assumed that this Court had jurisdiction* to review its judgment, and for that reason did not deem it "necessary to order a re-argument before a full bench, nor proper to certify questions to the Supreme Court for instructions" (Opinion in this case, 57 Fed. Rep., 422; 6 C. C. A., 413).

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I.

Plaintiffs utterly failed to prove that Gentry was killed by a flat car coupled in front of a locomotive as they alleged in their petition, or that his death was due to any negligence of the defendant. The Court should have directed a verdict for defendant.

The first error assigned is that the Circuit Court of Appeals was in error in affirming the action of the trial Court in refusing to give the following instruction, as requested by defendant :

"You are instructed that plaintiffs in this action have failed to prove their case, and have shown no right to recover. You are therefore instructed to find for the defendant."

The fifth error assigned is based on the refusal of the Court to charge as requested, in effect that the use of the locomotive and flat car under the circumstances was not in itself negligence ; and by the ninth error assigned objection is made to the charge of the Court on this point.

It is to be noted primarily, and kept in mind, that the evidence as to the manner of Gentry's death is entirely circumstantial. It is not claimed that there was any witness of the circumstances immediately attending his death. Plaintiffs below contended, and, under the allegations of their petition, of necessity contended, that upon the circumstances as proved the only conclusion that could be drawn was that he was killed by a flat car propelled by an engine in the yards of the railroad company. The only facts directly

proved to support this contention are that when last seen alive he was going towards the company's yard by way of a lonely path he was accustomed to take when going to the engine of which he was the engineer, and that nearly an hour later (Rec., p. 20) his mangled body was found upon one of the tracks in the yard, and also that evidences of its having been run over by the flat car were found upon the trucks of the car and the pilot of the engine propelling it.

We respectfully submit that these facts, even if conceded, are insufficient to prove plaintiff's case. There is nothing whatever in them inconsistent with other conclusions, viz: that the deceased was heedless and absent minded when he crossed the track, or that he crossed the same rashly in full view of the engine and car; or even that deceased was murdered or rendered insensible and his body placed upon the track with intent to hide the crime; or that he was taken suddenly ill and fell upon the track, where his unconscious body was mangled in the way described; or that he was killed by another train.

Indeed, it may fairly be said that either of these theories is more consistent with the proved facts than is the contention of plaintiffs that he was killed by the flat car, for the testimony shows that deceased was familiar with the yard and with the movement of switching engines therein (Rec. p. 52); that it had been his habit for years to be on his engine in close proximity to the place where his body was found, every other evening from shortly after eight o'clock, until he started on the run to Toyah at 9:25 o'clock (Rec., pp. 25, 30); and that the switching engine and flat-car were going very slowly and did not pass over the place where the body was found until 8:30 on the evening when his death occurred (Rec., pp. 22,

23, 24), while his hour for going on duty when in Big Springs was eight o'clock (Rec., pp. 25, 30). There was evidence tending to show that another train had passed over the track on which Gentry's body was found after eight o'clock on that evening (Rec., p. 22). We insist that plaintiffs failed to prove that the death of Gentry was caused by the flat-car running over him, as is alleged in their petition, and for this reason the jury should have been instructed to find for the railway company.

Moreover, mere proof that defendant was negligent (which we do not admit) will not justify a Court in submitting a case to the jury unless such negligence was the proximate cause of the damage sued for; nor is proof of negligence even when supplemented with proof that such negligence *might* have caused the injury, sufficient to sustain plaintiffs' case. They must show that the negligence of the railway company, as alleged in the complaint, was *the cause of the injury.*

The adjudged cases are clearly and decisively in point.

Thus, in Wakelin vs. London and Southwestern Ry. Co., L. R., 12 App. Cas., 41, the action was brought by the widow of a man whose dead body was found on the line of a railway near a level crossing of a pathway, he having been killed by a train which carried the usual headlights, but did not whistle or otherwise give warning of its approach. Defendants admitted that he was killed by the train, but denied negligence and pleaded contributory negligence. No evidence was given of the circumstances under which deceased got on the line. The jury found for the plaintiff. There was no witness to the accident. *Held*, by the House of Lords, affirming the decision of the Court of Appeals that, even

assuming (but without deciding), that there was evidence of negligence on the part of the company, yet there was no evidence to connect such negligence with the accident; that there was, therefore, no case to go to the jury, and that the railway company was not liable. Per Lord HALSBURY, L. C.:

"My Lords, it is incumbent upon the plaintiff in this case to establish by proof that her husband's death has been caused by some negligence of the defendants, some negligent act, or some negligent omission, to which the injury complained of in this case, the death of the husband, is attributable. That is the fact to be proved. If that fact is not proved the plaintiff fails, and if, in the absence of direct proof the circumstances as established are equally consistent with the allegation of the plaintiff as with the denial of the defendants, the plaintiff fails, for the very simple reason that the plaintiff is bound to establish the affirmation of the proposition; *ei qui affirmat, non ei qui negat incumbit probatio.*"

This principle has been settled by the Supreme Court of Texas.

Thus The Missouri Pacific Ry. Co. vs. Porter, 73 Tex., 304 (1889), was a suit by parents for injuries resulting in the death of a son. Plaintiffs alleged that their son was killed by being run over by plaintiff's train near where the track crossed a public highway, and was caused by defendant's negligence in not ringing a bell or blowing a whistle. The father testified that when he last saw the son he was walking between the rails of the track with a sack of meal on his head going home, and that he talked with him. This meeting occurred late in the day, and about an hour and a half before the train passed. Another witness testified he saw the meeting of the father and son, and that it took place on a dirt road running close to and parallel with the track. The road crossed the

track at a point south of and beyond this point. The body of the son was found next morning about one hundred and fifty or two hundred yards north of the crossing. Blood was found on the track from fifteen to forty yards north of the crossing. There was no evidence that any other train passed the place on that night.

The Court, per GAINES, J., said:

"The only possible way to construct a theory of the case, which would entitle plaintiffs to recover, is to deduce one presumption from another, and this the law will not permit (Lawson on Pres. Ev., Rule 118, p. 569). Where there is no eye-witness, proof of negligence on part of a railroad company, and of care on part of a person killed at a crossing, the facts may be established by circumstances (Railroad Co. vs. Hall, 61 Pa. St., 361), but the circumstances themselves must be shown by direct evidence, and cannot be inferred from other circumstances. It is not admissible to go into the domain of conjecture and to pile one presumption upon another (Railroad Co. vs. Henrice, 92 Pa. St., 431; U. S. vs. Ross, 92 U. S., 284; Douglass vs. Mitchell, 35 Pa. St., 440).

"There is evidence tending to show negligence in the railroad company in failing to give a signal upon approaching a crossing where it had been accustomed to ring a bell or blow a whistle. But whether this contributed to the death of Ernest Porter or not, and whether he exercised due care or not, the evidence leaves us wholly in doubt. The case developed by the record leaves the circumstances of his death enveloped in mystery. The testimony fails to show negligence on part of the defendant contributory to the injury. It tends to show negligence on part of the deceased in walking upon the track, and there is nothing but very remote circumstances to rebut this presumption. It appearing that the train did not pass until long after he had time to have reached home, it would seem that the most plausible theory is that, being overcome with fatigue, he sat down upon the track to rest and unintentionally fell asleep and was in that condition run over and killed. No one saw the accident; the evidence tends to show

that the deceased was negligent in walking along the track, and the circumstances directly proved neither showed that the negligence of the company caused the injury or that the deceased's negligence did not contribute to it, and, therefore, the verdict must be set aside. The judgment is reversed and the cause remanded."

The rule upon this subject is thus stated by this Court in United States vs. Ross, 92 U. S., 281, 283, 284:

"Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Evid., p. 80, lays down the rule thus: 'In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.' It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote reference (Best on Evid., 95). A presumption which the jury is to make is not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption. There is no open and visible connection between the fact out of which the first presumption arises and the fact sought to be established by the dependent presumption (Douglas vs. Mitchell, 35 Penn. St., 440)."

Under these rules and principles the case of the present plaintiffs was fatally defective, and for this reason the Court erred in refusing the instruction above quoted asked for by the defendant, and in submitting the case to the jury.

II.

The undisputed facts of the case not only did not establish any actionable negligence on the part of the defendant, but on the contrary negatived any such negligence, and the Court ought to have charged and instructed the jury accordingly.

A last analysis of the pleadings and evidence will show that, unless the Court can reach the extraordinary conclusion that the customary use, under the circumstances, of a road engine with a flat car in front of it for switching purposes, in a yard where railway trains are constantly being made up, constitutes actionable negligence *per se*, the plaintiff cannot recover. A necessary sequence of such a conclusion would be the still more extraordinary rule that it is negligence *per se* to permit a switching engine, in making up trains, to *push* a flat or box car in the yards of the railway company. Obviously, a regulation in compliance with such a rule would be impracticable.

The 2d, 3d and 5th paragraphs of the Court's charge (Record, pp. 65, 66), and the Court's refusal to give each of the six special instructions asked by the defendant (Record, pp. 62–65) were erroneous.

The following is believed to be a correct summary of the evidence :

The only act of negligence, on the part of the railway Company, complained of, is that on the night when Gentry was killed it was operating a road engine in its yard at Big Springs with a flat car attached in front of it for switching purposes. This usual device was used instead of an ordinary switch engine because

the regular switch engine was then in the shops being repaired (Rec., 20, 22, 28, 35, 47, 52). The only differences between a road engine and a switch engine are that a switch engine has no pilot, while a road engine has, and that a road engine has no step in front of it, nor draw-head, both of which are parts of a switch engine (Rec., pp. 23, 25, 27, 28, 30, 38, 39, 46). When a road engine is used for switching purposes a flat car is coupled in front of it to enable switchmen the more easily to attach other cars to it in the usual manner and without the necessity of handling the heavy pilot-bar which is used for coupling purposes on the road engine (Rec., 52–3, 59, 62), and in order to avoid the danger which would be incurred by persons coupling cars from the pilot. In yards where trains are made up it is undesirable to use a road engine alone for switching purposes, for the reason that the pilot-bar is very heavy, weighing from 60 to 90 pounds (Rec., 52, 61), and in making couplings the switchman would have to lift it up, and would be in danger of being struck by the pilot (Rec., 52, 53, 59, 62). The proof shows that in switching and making up trains in the yard, even a switch engine is as likely to be pushing a flat car or even a box car in front of it as to be pulling cars (Rec., 21, 26, 29, 31, 36, 39, 42, 47–8, 60). In other words, switching engines, in making up trains in the yard, both push and pull cars coupled to them, so that, even if a switch engine had been in use on the night when Gentry died, an equal probability arises that it would have been pushing a flat car or box car in front of it. The proof further shows that the defendant company had rules which were complied with in every particular in the matter of ringing the bell of the engine while making up trains

in the yard (Rec., 22, 23, 24, 53). It further shows that the head-light on the engine was in good condition (Rec., 20, 24, 31, 34, 36, 48), and that the light reflected from it struck the flat car at about its middle, illuminating the forward end (Rec., 20, 23, 24, 25, 27, 28, 30, 31, 32, 34, 48, 52). It was proved that the engine and flat car were going very slowly (Rec., 22, 24). The evidence clearly shows that it was not only the custom of the defendant company to use a flat car coupled in front of a road engine for switching purposes when the regular switch engine was being repaired (Rec., 39, 42, 47, 52, 54), but that such was the universal custom of the roads in Texas and some of the other States (Rec., 55, 56, 58, 59). Circumstances were proved very strongly tending to show that Gentry was not only well aware of this custom of using a road engine with a flat car in front for switching purposes, but also that he had an opportunity on the very day of his death of seeing the very engine and flat car, by which it is claimed he was killed, then in use for switching purposes (Rec. 21, 26, 31, 34, 37, 52, 56, 60; see on this point the evidence of *Douglas* on page 52 of the Record). As has been said, there is no direct evidence whatever that Gentry was killed by the flat car. Yet from these facts alone plaintiffs contend that Gentry met his death solely on account of the use of a flat car attached to a road engine. Testimony was introduced tending to show that the use of a switch engine in the yard is a safer method of switching cars than is the use of a road engine with a flat car thus attached. An examination of the testimony will show that by "safer" all the witnesses meant that a switch engine so used is safer to the *parties engaged in switching*, not that it is safer to other persons otherwise em-

ployed in the yard or to the general public (Rec., 21, 23, 24, 25, 28, 31, 33, 34, 37, 38, 40, 47, 54, 56, 58, 59).

We respectfully submit that the proof utterly fails to show any negligence whatever on the part of the railway company, but on the contrary, it shows that, in using the road engine and flat car for switching purposes when the regular switching engine was laid up for repairs, the company adopted and used an entirely proper device, one which it was in the habit of using under such circumstances, and such as is customarily used by other railroads under like circumstances; that such use was well known to its employees; that Gentry had every opportunity to know of such use, and beyond doubt actually did know it on the very day of his death; that the use of the road engine and flat car was no more dangerous to employees of the railway company not actually employed in switching than was an ordinary switching engine; and that every precaution by way of ringing the bell and illumination was taken to avoid accident.

We submit, with confidence, that the undisputed evidence shows that the company was guilty of no negligence.

We submit also that in view of all the testimony as to Gentry's familiarity with the yard and the making up of trains therein, and his opportunities for knowing of the use of the road engine and flat car on the 13th of March, 1890, it is impossible to avoid the conclusion that if his death was not caused by foul means or by sudden illness or some other unknown circumstance, it was due to his own negligence and to no other cause.

On this evidence we insist that the Court erred in submitting the case to the jury. It ought to have given the defendant's sixth instruction (Record, p. 65), for the reasons specified in the first assignment of error (Record, p. 70). If not, it ought to have instructed the jury as asked in the defendant's first five instructions (Rec., pp. 62-64)—that is, to have given those instructions either as asked or in effect. It did neither, but failed to gvie the jury any instructions such as the facts required.

The *first* charge of the Court (p. 65) we have already commented on.

The *second* charge (p. 65) is so general as to afford no guide to the jury, and there was no evidence upon which to submit to the jury the question whether the defendant's engine and flat car were "reasonably safe and fairly adapted for switching purposes."

The *third* charge (p. 65) and the *fifth* charge (p. 66) were erroneous for the same reason last above given, and for the further reason that if "the appliances were unsafe by reason of the way the light from the head light struck the flat car and the track of the road," this was not the case of defective or unsafe machinery and appliances for which the company would be liable but the case of the negligence of a fellow servant for which the company would not be liable. The court ought to have laid down the law as asked in the defendant's 2d, 3d and 4th instructions and for the reasons in said instructions stated (Record, p. 63).

The charge of the Court was vague, general and indefinite, and it left the jury without any guide or chart as to its duty, and was, in effect, a *carte blanche* to find for the plaintiff from sympathy or against the defendant from prejudice.

The unfortunate death of Gentry was clearly one of usual and obvious risks of the employment, even assuming that his death was caused in the way claimed by the plaintiffs, namely, by the road engine and flat car thereto attached.

This subject is more fully discussed in Points V. and VI., *infra*.

The Question is Properly Saved.

One objection to the assignment of error based upon the sixth instruction asked by the defendant and refused by the Court which the defendant in error made in their brief on motion to dismiss or affirm (p. 11), was, that it "cannot avail the plaintiff in error, because its failure to request the peremptory instruction at the close of the plaintiff's testimony, and to stand on that alone, and going to the jury on the issues and introducing testimony in its own behalf, is a waiver of the error, if there was any."

Counsel have apparently confounded a request for an instruction to the jury upon all the evidence with a motion to direct a verdict made at the close of Plaintiff's case.

The authorities cited undoubtedly hold that an exception made on the denial of a motion to direct a verdict on plaintiffs' evidence is waived if defendant proceeds with his case and does not rely upon the exception, but a motion of that character is not the subject of this assignment of error.

FOR THE FOREGOING REASONS WE INSIST THAT *it was the duty of the trial Court to instruct the jury to render a verdict for the defendant, as requested by the defendant, and that the Court erred in submitting the case to the jury.*

Requesting an instruction to direct a verdict has the same effect as a demurrer to the evidence. It requires of the Court that it should apply the law to the facts in evidence, and it becomes the duty of the Judge to decide whether the facts, legitimately considered, are sufficient in law to support the issue and establish a cause of action in behalf of the plaintiff.

In Merchants' Bank vs. State Bank, 10 Wall., 637, the Court, upon request of counsel, instructed the jury to find for the defendant. The case, on appeal, was well considered and contained mooted questions of law. Justice SWAYNE, in announcing the decision said:

"According to the settled practice in the courts of the United States, it is proper to give an instruction if it were clear that plaintiff could not recover. It would have been idle to proceed further when such must be the inevitable result. The practice is a wise one; it saves time and costs. It gives the certainty of applied science to the result of judicial investigation. It draws clearly the line which separates the provinces of the Judge and the jury and fixes where it belongs the responsibility that should be assumed by the Court."

In Steamship vs. Merchant, 133 U. S., 375, the opinion states that the Court erred in not instructing the jury to find a verdict for the defendant.

In Pleasant vs. Fant, 22 Wall., 120, Justice MILLER says:

"No doubt there are decisions to be found which go a long way to hold that if there is the slightest tend-

ency in any part of the evidence to support the plaintiff's case it must be submitted to the jury, but as it was said by this Court in the case of Improvement Company vs. Munson, 14 Wall., 448, recent decisions of higher authority have established a more reasonable rule, that **in every case before the evidence is left to the jury, there is a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any evidence upon which the jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof imposed."**

Numerous English authorities are cited by Justice MILLER, sustaining his position.

In the case of Parks vs. Ross, 11 Wall., 362, the Court held that granting an instruction, like the present one, had superseded the ancient practice of demurring to the evidence, and it answers the same purpose and should be tested by the same rules.

In Schuchardt vs. Allen, 1 Wall., 359, cases are referred to as establishing the doctrine that if the evidence be not sufficient to warrant a recovery, it is the duty of the Court to instruct the jury accordingly.

So in the later cases in this Court:

"It is the well-settled law of this Court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that a verdict if returned must be set aside, the Court is not bound to submit the case to the jury, but may direct a verdict for the defendant."

Randall vs. Balt. & O. R. R., 109 U. S., 478, 482: In the case last cited, the record shows that "at the close of the whole evidence the Court directed the jury to return a verdict."

Commissioners vs. Clark, 94 U. S., 278, 284.
Del. & Lack. R. R. Co. vs. Converse, 139 U. S., 469.

Richmond & Danville R. R. vs. Powers, 149 U. S., 43.

Defendant's Exceptions Were Specific and Not General.

Objection was also made (Br. on motion to dismiss or affirm, p. 13) to this assignment of error because, as is claimed, the instruction to which it relates, was one of six instructions asked for by defendant below in writing which were presented and refused "as a whole" and not *seriatim*. The same objection was made to each of the first six assignments of error.

By the record it appears (Tr., p. 65):

"These special instructions the Court refused, and the defendant then and there excepted before the jury retired to the action of the Court *upon each of said six instructions at the time of the refusal thereof.*"

Exceptions having been taken to the action of the Court upon *each* of the six requests for instructions, the case does not come within the rule applied in Union Ins. Co. vs. Smith, 129 U. S., 405; and Moulor vs. American Life Ins. Co., 111 U. S., 335, in both of which cases a "general" exception was interposed to the ruling of the Court upon a number of requests to charge.

But there is another and a more serious aspect of this matter. Not only is the inference suggested by counsel for plaintiff in error without foundation in the terms of the record—it appearing that the exceptions were taken to each instruction—but this inference is untrue in point of fact. The record as to these exceptions is merely a condensation of what actually occurred,

but it shows clearly enough that an exception was separately taken to each refusal of the Court to give the specific instruction requested. As a matter of fact the six special instructions were all asked separately ; and were presented on six separate papers numbered for the purpose of identification or reference. We cannot conceive it possible that, in view of the terms of the record upon this point, the objection made by counsel for defendants in error will be seriously treated by the Court ; but in the event that we should be mistaken in this, we should ask the Court for an opportunity by proper process to bring before it the original instructions asked, with original notes of their disposition and of the separate exceptions taken thereto.

The last objection to the first error assigned by defendants in error in their brief on the motion to dismiss or affirm (p. 32), was that a plea of contributory negligence, being by way of confession and avoidance, admits the negligence of defendant.

If this were the rule, plaintiffs were under no necessity of introducing any testimony whatever tending to show negligence on the part of defendant, for under this claim none was necessary, negligence being admitted.

The answer denied any negligence on the part of the defendant.

While it is undoubtedly true that upon the trial the question of negligence, and a defense of contributory negligence, are oftentimes so closely interwoven that the testimony offered to support the one bears also upon the other, there is nothing in this fact relieving a plaintiff from establishing the allegations upon which

his right of recovery rests. The burden of proof of negligence is upon him. It is the essence of his case. When he has proved a *prima facie* case, and not until then, is the defense of contributory negligence, or any other defense, material.

It was aptly said by Lord WATSON in Wakelin vs. London & S. W. Ry. Co., L. R., 12 App. Cas., 41, above referred to:

> " In the present case, I think the appellant must fail, because no attempt was made to bring the evidence in support of her allegations *up to the point at which the question of contributory negligence becomes material.*"

In Texas, the rule as to burden of proof of negligence and of contributory negligence, pleaded as a defense, is stated to be as follows:

> " We believe the true rule to be as thus stated by an elementary writer: 'No doubt where, in an action for injuries caused by failure of duty on the part of defendant, the failure of duty and the injury are shown by the plaintiff, and there is nothing that implies that he brought on the injury by his own negligence, then the burden is on the defendant to prove that the plaintiff is guilty of such negligence. On the other hand, when the plaintiff's own acts casts upon him the suspicion of negligence, then he must clear such suspicion.' Wharton on Negligence, 426."
>
> Dallas & Wichita Ry. Co. vs. Spicker, 61 Texas, 427, 429.

Under this rule, either the defendants in error must abandon this objection or their case must fall because they have failed to exonerate the deceased from all " suspicion " of contributory negligence.

The trial Court should have instructed the jury to find for defendant as requested.

III.

The Court clearly erred in instructing the jury that there was no dispute as to the cause of Gentry's death, and in allowing testimony to be introduced on the same assumption.

The seventh assignment of error is that the Circuit Court of Appeals erred in affirming the ruling of the Circuit Court in instructing the jury against the objection of defendant, as follows:

> "In this case there is no dispute about the following facts: Louis D. Gentry, on the night of the 13th March, 1891 [1890], was run over and killed by a flat car of defendant propelled by a switch engine in its yards at Big Springs, Texas."

This instruction was exceedingly unjust and improper. It begs the whole question as to the manner of Gentry's death, and assumes that the first important allegation of the petition in this respect was true and not controverted—even by the answer. We admit that the circumstantial evidence strongly tended to show that the body of Gentry was run over by the flat car, but there was no direct evidence that his death was *caused* by his being run over by the flat car, and plaintiffs' allegation that his death was so caused was denied in the answer. If the case could properly be sent to the jury it should have been submitted to them in an impartial manner. The jury is to decide the presumptions arising from circumstantial evidence, not the Court. The Court might, with equal propriety, have inferred from the evidence that Gentry was rendered insensible by a blow on the head and his body placed

on the track to conceal the assault, or that he was killed by another train. The injustice to plaintiffs of such a charge would be no greater than is the injustice done defendant by the instruction as given.

The prejudicial effect of this instruction upon the minds of the jury is apparent and requires no comment.

This instruction cannot be justified on the ground that it was the opinion of the Court upon the evidence, which is allowed to be given in the courts of the United States. It is not in form an opinion, nor does it purport to be an opinion. Its language is emphatic and certain—"*There is no dispute*," &c. This Court has expressed its opinion upon an instruction of this kind, thus:

> "Courts cannot assume, in their instructions to juries, that material facts upon which the parties rely are established, unless they are admitted, or the evidence respecting them is not controverted. The courts would otherwise encroach upon the appropriate and exclusive province to the jury."
>
> Bank of Leavenworth vs. Hunt, 11 Wall., 391, 394.

> "It is not allowable to assume as existing facts not proved, and to ask a direction to the jury upon such assumption. This practice would tend to embarrass and mislead the jury."
>
> Railroad Co. vs. Gladmon, 15 Wall., 401, 409.

The same question was presented in the fourteenth and sixteenth assignments of error on exceptions to the action of the trial Court in permitting witnesses, against the objection of defendant, to testify that Gentry was killed by the flat car, when it was admitted that they

were not present when he was killed, and knew nothing whatever of their own knowledge about the matter concerning which they testified so positively.

IV.

The Court erred in refusing to instruct the jury that it was incumbent upon Gentry to "look and listen" for the approach of the switching engine before crossing the railway track.

The second error assigned is founded on the refusal of the Court to give an instruction, asked by defendant, to the effect that it was the duty of Gentry to "look and listen" before attempting to cross the railway tracks (Record, p. 62). The reason why this instruction in form or substance should have been given is set forth in the assignment of errors (Record, p. 71), and is obvious. The instruction was applicable. It was correct. It was refused, and nothing was given by the Court in place of or relating to the same subject. The rule on this subject is well-settled by the decisions of this Court.

Railway Co. vs. Houston, 95 U. S., 397.
Schofield vs. Railway Co., 114 U. S., 615.
Aerkfetz vs. Humphreys, 145 U. S., 418.
Baltimore & Ohio vs. Griffith, 159 U. S., 603.

And of the Courts of Texas:

H. & T. C. Ry. Co. vs. Smith, 52 Tex., 185.
G. H. & S. A. Co. vs. Bracken, 59 Tex., 71.
H. & T. C. Co. vs. Richards, 59 Tex., 373.

G. H. & S. A. Co. vs. Chambers, 73 Tex., 296.
Mo. Pac. Ry. Co. vs. Porter, 73 Tex., 304.
I. & G. N. Ry. Co. vs. Garcia, 75 Tex., 583.
S. & E. T. R. Co. vs. Dean, 76 Tex., 73.

A person who steps upon a railroad track in front of an engine, car or train, from which danger he might have saved himself by the proper use of his senses, contributes directly to his injury, and no cause of action lies for the injury.

We insist that the uncontroverted evidence in this case shows that the deceased placed himself in a position where the engine and flat car must necessarily strike him as it passed, if the same did run over and kill him, which is not admitted; and that at a time when it was within a few feet of him, going at a slow rate of speed (Rec. 22, 24), that the headlight on the engine and the engine bell ringing warned him to keep off the track, yet he did not look to the right or left, or use his senses of sight and hearing, or use any care whatever to prevent being injured; that, if he listened and looked, he paid no attention to what he heard or saw, and carelessly or rashly attempted to step across the track just in front of the engine and car. This is the only reasonable conclusion which can be drawn from the evidence. The acts of negligence on the part of the defendant pleaded and complained of and relied upon by the plaintiffs are the use of a road engine and flat car for switching purposes, without having taken the precaution of placing a light or lantern on the flat car, and in the use of a headlight on said engine, so constructed that the rays of light from it reflected over and beyond the flat car, so that the position of the flat

car could not be seen by the employees of the defendant crossing its track in front of the same while working or being in defendant's yard, and in not having the said yard so lighted at places therein where defendant's employees were accustomed to cross the track in the course of their employment.

The evidence wholly fails to establish the right of plaintiffs to recover on the grounds alleged, for the reason, the evidence shows without contradiction (1) that during the several years, eight or more, that L. D. Gentry was in the employ of defendant at Big Springs, said yard was never lighted at the places plaintiffs claim it should have been lighted, and that the deceased knew this fact, or by the exercise of ordinary care would have known it; so that, in accepting and remaining in said employment, and in crossing the tracks at night, said Gentry assumed the risks incident to the working and being in said yard as such employee without it being so lighted. (2) Instead of the evidence showing that the headlight upon the engine did not reflect upon the flat car in front of the engine, as alleged, it shows, without contradiction, that said headlight illuminated said flat car about half way furthest from the engine. Hence, any employee, by looking before stepping on defendant's track just in front of the car, could see said flat car and keep out of the way, as it was his duty to do. That he would see the end of the car lit up by the headlight of an engine is a physical fact which cannot be controverted.

INSTEAD OF THE EVIDENCE SHOWING THAT THE USE OF THE ENGINE AND FLAT-CAR FOR SWITCHING PURPOSES WAS

NEGLIGENCE ON THE PART OF DEFENDANT, it showed that said engine and flat-car were being used temporarily for switching purposes, the regular switch engine being in the shop for repairs ; that to do so was customary at Big Springs and elsewhere, and it was considered proper, as it had been for years during the employment of deceased at Big Springs ; that it was known to Gentry, or by the exercise of ordinary care it would have been known to him ; that the flat-car was attached to the engine for the safety of the switchmen using the same, and that the engine and flat-car constituted the best appliance available when the switch engine was out of repair and in the shop for repairs, and was proper and suitable for such use.

THE UNCONTROVERTED EVIDENCE SHOWING THAT THE BELL WAS RINGING AND THE HEADLIGHT BURNING, Gentry could have heard the ringing and seen the light and been put upon notice that the engine was coming while under the coal chute. It being customary and usual to use an engine and flat car for switching purposes under the circumstances existing in this case, and this having been the custom for years while deceased was in the employ of defendant at Big Springs, it was his duty, if he considered the same dangerous to himself or to employees in and about the yard, to complain of the same to defendant, which he never did. When the regular switch engine was working in the yard, flat cars as well as box cars were frequently attached to the same, all of which was known to the deceased, or by the exercise of ordinary care would have been known to him, and had a flat car been attached to the regular switch engine for the purpose of the flat car being moved in and

about the yard, the deceased crossing defendant's track would have been subjected to exactly the same danger he was subjected to by the use of the engine and flat car herein complained of.

ACCORDING TO ONE OF PLAINTIFF'S THEORIES IN THIS CASE, A LIGHT OR LANTERN SHOULD HAVE BEEN KEPT ON THE FRONT OR FAR END OF THE FLAT CAR, although it was enveloped in the rays of the head light, 80 candle power, while the engine and flat car were moving about in the yard. Such a light would have been useless. But if this theory were true, it was the fault of the co-employees of deceased operating the engine and flat car in the yard, and they and the deceased being fellow-servants, defendant is not liable for their failure to keep a lantern on the end of the flat car. However, the brilliant headlight and bell ringing was proper and sufficient warning. The speed was slow. It was certainly sufficient warning to have prevented the accident but for the carelessness of Gentry.

Such is the law in *Texas* as well as elsewhere. Thus in G., H. & S. A. Ry. Co. vs. Bracken, 59 Tex., 71, the Court, Judge WILLIE rendering the opinion, says:

"There can be no doubt but that such circumstances show a high degree of negligence on the part of Bracken and preclude him from a recovery in the present action. The principles applicable to such facts have been so well settled by the decisions of the highest courts of the country that it is unnecessary to discuss them. **Any one about to step upon a railroad track must listen and look before attempting to cross, in order to avoid an approaching train, and not walk carelessly into a place of possible danger. Failure to do so is not merely an imperfect performance of duty, but an entire failure of performance, which bars his right to recover damages, for he he contributed proximately to the injury.**"

In the *Bracken case*, from which we have just quoted, the railroad company had a platform at Harrisburg. The steps led down from the platform to the track, and the platform extended out from the hotel, on the opposite side of which there was also steps leading down to the track. On the occasion of the accident an engine with coach attached was coming down at the rate of eight miles per hour on the track in full view, and Bracken attemped to cross the track going from the depot to the hotel.

In the case at the bar, the deceased was not at such a public place as the crossing between the hotel and depot. He was in defendant's yard, a place as deceased well knew, used for the purpose of making up trains; a place filled with tracks, where defendants switch engine was at work moving cars night and day, necessarily a dangerous place. The deceased, if he was run over and killed by the engine and flat car, and was struck before he got across, necessarily stepped on the track within a few feet of the approaching engine and car, lights burning, bells ringing and going at a slow rate of speed.

In the case of I. G. N. Ry. Co. vs. Garcia, 75 Tex., 583, the plaintiff, who was struck in attempting to cross the track, testified: "I looked to the right and left along the track when I came up to the track, but I did not see any train." The Court held that according to the testimony, if he had looked he could have seen the train and could have avoided the accident.

BECAUSE WE CONSIDER IT A CONTROLLING PROPOSITION, we repeat that every one about to step upon a railroad track must "listen and look" before attempting to cross, in order to avoid an approaching train or engine, and not walk carelessly into a place of danger. A person who exposes himself to such danger as this, from which he might have saved himself, by the proper use of his senses, contributes directly to his injury, and no cause of action lies for the injury.

Duty on the part of railroad companies towards persons on their tracks only arises when and after the perilous position of the person is discovered, then it becomes their duty to use all reasonable efforts within their power and at their command to avoid injuring such person thus in the wrong.

In further support of this doctrine and as illustrating its application we refer to the following cases:

Authorities:

Texas:

Cases in this State cited *supra*, p.

United States:

Cases in this Court cited *supra*, p.

Alabama:

Golbard vs. Ry. Co., 69 Ala., 114.
Ry. Co. vs. Thompson, 62 Ala., 424.

Connecticut:

Peck vs. Ry. Co., 14 A. & E. Ry. Cases, 633.

California:

Fleming vs. W. P. Ry., 49 Cal., 253.
Glasscock vs. C. P. Ry., 73 Cal., 137.

Illinois :

C., etc., Ry., vs. Dimmick, 96 Ills., 42.
Pa. Ry. vs. Rudel, 100 Ills., 603.
Ry. vs. Still, 19 Ills., 499.
C., etc., Ry. vs. Hatch, 79 Ills., 137.
Ill. C. Ry. vs. Goddard, 72 Ill., 567.
Ry. Co. vs. Bynham, 80 Ills., 528.
C., etc., Ry. Co. vs. Bell, 70 Ills., 102.

Indiana :

T. A., etc., Ry. vs. Clark, 73 Ind., 168.
Bellfontaine, etc., Ry. vs. Hunter, 33 *Id.*, 365.
Ivens vs. Ry. Co., 23 A. & E. R. R. Cases, 258.
J. B. & W. Ry. vs. Hammock, N. E. Rep., 737.
S., etc., vs. Matthias, 50 Ind., 65.

Iowa :

Schaeffert vs. Ry. Co., 14 A. & E. R. R. Cases, 696; 62 Ia., 624.
Pence vs. Ry. Co., 19 *Id.*, 366.
Benton vs. R. Co., 42 Ia., 192.
Harris vs. C., 41 Ia., 227.
Lavarenz vs. C., etc., 56 Ia., 689.

Kansas :

Ry. Co. vs. Adams, A. & E. R. R. Cases, 376; 33 Kas., 427.
W., etc., Ry. vs. Davis, 16 Pac. Rep., 78.
A., T. & S. F. vs. Townsend, 35 A. & E. R. R. Cases, 352.

Massachusetts :

Wheelwright vs. Boston, etc., Ry., 135 Mass., 225.
Tully vs. Fitchburg Ry., 134 *Id.*, 499.
Allyn vs. Boston, etc., Ry., 105 *Id.*, 77.

Wright vs. B. & M., 129 Mass., 440.
Butterfield vs. W. R. C., 10 Allen, 532.

Missouri :

Kelly vs. H., etc., Ry., 75 Mo., 138.
Henze vs. St. L., etc., Ry., 71 Mo., 636.
Zimmerman vs. R. R. Co., 71 Mo., 476.
Powell vs. R. Co., 76 Mo., 80.
Fletcher vs. R. Co., 64 Mo., 484.
Steff vs. Ry. Co., 85 Mo., 229.

Maine :

Le San vs. M. C. Ry., 77 Me., 85.

Michigan :

Kwiotkowski vs. R. Co., 38 N. W. Rep., 463.
Haas vs. G. R. Ry., 47 Mich., 401.
L. S., etc., Ry. Co., vs. Miller, 25 *Id.*, 274.
Mahlen vs. Ry. (Mich), 14 A. & E. R. R. Cases, 687.
Pzolla vs. Ry. (Mich.), 19 *Id.*, 334.
Muyning vs. Ry. (Mich.), 23 *Id.*, 317.
Straight vs. L. & N. (Mich.), 36 N. W. Rep., 161.

Minnesota :

Brown vs. R. R. Co., 22 Minn., 165.
Marty vs. C., etc., Ry., 35 N. W. Rep., 670.

Maryland :

Ry. Co. vs. State, 19 A. & E. R. R. Cases, 326.
Ry. Co. vs. Hobbs, 19 *Id.*, 337.
R. R. Co. vs. Neubeur, 62 Md., 391; A. & E. 261.

Mississippi :

Ry. Co. vs. Mitchell, 52 Miss., 812.

New Jersey :

Telfer vs. North, etc., Ry., 30 N. J. L., 138.
Hamilton vs. R. Co., 13 A. R., 29.
Berry vs. P. R. Co., 48 N. J. L., 141 ; 26 A. & E., 396.
Pa. Co. vs. Righter, 42 N. J. L., 180 ; 2 A. & E., 220.

New York :

Wilcox vs. Rome, etc., Ry., 39 N. Y., 358.
Baxter vs. Troy, etc., Ry., 41 *Id.*, 502.
Young vs. N. Y., etc. (N. Y.), 14 N. E. Rep., 434.
Harty vs. R. Co., 42 N. Y., 468.
Wilds vs. R. Co., 24 N. Y., 430.
Oorton vs. Ry. Co., 45 N. Y., 660.
McGrath vs. N. Y. C., 59 N. Y., 468.
Bullen vs. D. & H. Co. (N. Y.), 21 N. E. Rep., 716.

Ohio :

Pa. Ry. vs. Rathgeb, 32 Ohio St., 66.
B. & O. R. R. vs. Whitehead, 35 *Id.*, 627.

Oregon :

Durbin vs. Oregon, etc., Ry. (Sup. Ct., Feb. 15, 1888).
Ry. and Corp., L. J., Vol. 3, p. 371 ; 32 A. & E., 149.

Pennsylvania :

Reading, etc., Ry. vs. Ritchie, 102 Pa. St., 425.
Pa. Ry. vs. Beale, 73 *Id.*, 504.
North Pa. Ry. vs. Heilman, 49 *Id.*, 60.
Hanover Ry. Co. vs. Coyle, 55 *Id.*, 396.
Lehigh Valley Ry. vs. Hall, 61 *Id.*, 361.

P., etc., Ry. vs. Boyer, 97 Pa. St., 91; 2 A. & E., 172.

Greenwood, etc., Ry. Co., 17 Atlantic Rep., 188.

Rhode Island:

Ormsbee vs. R. Co., 14 R. I., 102.

Virginia:

N. Y. P. etc. vs. Kellam, 3 S. E. Rep., 703.

Wisconsin:

Seefield vs. C., etc., Ry., 70 Wis., 216; 32 A. & E. R. R. C., 109.

Winstaley vs. C., etc., Ry. (Wis.), 35 A. & E. R. R. C., 374.

English:

Dublin, etc., Ry. vs. Slatterly, 3 L. R. App. Cases, 1155.

Stapely vs. London, etc., Ry., L. R. 1 Exch.; 13.

Cliff vs. Midland Ry., L. R. 5 Q. B., 258.

Skelton vs. R. Co., L. R. 2 C. P.. 631.

We respectfully submit that the decisions here quoted control the case at the bar.

Plaintiffs below cannot claim that the headlight of the engine did not illuminate and make plain to any one the flat car. They may contend that the headlight blinded the deceased. If this be true, he knew that switch engines with flat cars attached in front and behind them were continuously moving in and about the yard, and if the light did blind him he knew then and there the blinding effects thereof, and it was as careless for him to step upon the track just in front of a car as it would have been for a blind man to have so acted. We submit that if he was blinded by the headlight that

he was guilty of the grossest negligence, being blinded, in walking upon the track under the existing circumstances. We submit, however, that the evidence shows without contradiction that, by the exercise of ordinary care, he could have seen the flat car.

We submit that a blind man who would attempt to cross the track just in front of the engine, the puffing and blowing of which he could hear, hoping to get across the track before the engine could strike him, would be guilty of the grossest negligence. In this case the deceased was not blind. He could see the engine with its headlight illuminating fifteen or twenty feet of the flat car next to the deceased, and lighting up the track for some distance ahead.

We submit that if a regular switch engine had been in use on the occasion in question that the rays from the headlight thereof would have blinded the deceased the same as did the rays of the headlight of the engine in use.

At the very least the jury should have been specifically instructed on the point, and they were not, although the defendant asked for appropriate instructions which were refused and none were given on the subject.

V.

The Court erred in refusing to instruct, at defendant's request, that an employee is charged with notice of the dangers incident to his occupation, and, in effect, charging the jury that "full knowledge"

only by the employee of defective apparatus exonerates the employer from liability for injuries caussd by such apparatus.

The third assignment of error is directed to the refusal of the Court to grant the request of defendant to instruct the jury as to the notice which the law presumes an employee has of the dangers incident to his occupation, and of his assumption of the risks attending such occupation (Record, pp. 63, 71). By the eighth assignment error is alleged in the charge of the Court to the jury in stating the law on this subject, and the tenth and twelfth assignments of error contain exceptions to the charge of the Court as to the degree of knowledge of defective appliances which is required of an employee, and of the effect thereof on his right to recover for injuries caused by such defective machinery.

Tuttle vs. Detroit, etc., Ry. Co., 122 U. S., 189.

Coyne vs. Union Pac. Ry. Co., 133 U. S., 370.

Washington Co. vs. McDade, 135 U. S., 554.

Bunt vs. Sierra Butte Gold Co., 138 U. S., 483.

Kohn vs. McNulta, 147 U. S., 238.

G. H. & S. Ry. vs. Drew, 59 Tex., 10.

G. H. & S. Ry. vs. Lempe, 59 Tex., 19-24.

Railway Co. vs. Bradford, 66 Tex., 732.

G. C. & S. F. Ry. vs. Donnelly, 70 Tex., 373.

Railway Co. vs. Somers, 71 Tex., 700.

Rogers vs. Galveston City Ry., 76 Tex., 502.

St. L. A. & T. Ry. vs. Lemon, 83 Tex., 143.

A servant assumes all patent and obvious risks, as well as those naturally incident to the business, and where he knows or ought to have known by the exercise of ordinary care of a defect in the appliance used, and continued in his employment and receive injuries therefrom, he is treated as being guilty of contributory negligence and cannot recover.

The Court charged the jury in this case that the deceased assumed the risk naturally incident to crossing the railroad track of defendant at Big Springs to reach his car or in crossing it for any other purpose. The Court failed and refused, as requested by the defendant, to instruct the jury that the deceased not only assumed the risk naturally incident to crossing the railroad track, but also assumed all patent and obvious risks, and that if he knew or ought to have known by the exercise of ordinary care of the use of the appliances complained of and continued in his employment, he assumes the risk and cannot recover.

As shown by the authorities cited, this is the well-established law.

Although requested by the defendant, the Court *failed to charge the jury as to the degree of care* incumbent upon deceased in the use of the crossing, as requested by defendant, and failed to submit to the jury a material issue, namely, *the question as to whether or not deceased was guilty of contributory negligence.* Plaintiffs were not entitled to recover if the deceased was guilty of a want of ordinary care contributing to his injuries, and the failure of the court to so qualify his charge was radically wrong, ignoring the question as to whether deceased was guilty of negligence contributing to his injury.

The Court failed, though requested by the defendant,

to instruct the jury that it was the duty of deceased to listen and look for trains, cars and engines, before going upon the track. It likewise failed to instruct the jury that if he saw the engine and flat car, or by the exercise of ordinary care could have seen the same, and attempted to cross the track, and stepped on the track just in front of the same, that his own contributory negligence would prevent a recovery.

While the plaintiffs have wholly failed to show how the deceased met his death, the facts do show that if he was killed by being run over by the engine and flat car, he stepped on the track just in front of the same when it was going at a slow speed and when there was a brilliant headlight on the engine, lighting up the end of the flat car next to him and warning him of the danger into which he was rushing. To cross the track only took a few steps, and when he stepped on the track necessarily the flat car was within a few feet of him, being enveloped in the rays of the light from the headlight ; if he had looked he would necessarily have seen the flat car, and would have kept off of the track and prevented the injury. The coal-chute was ten or fifteen feet from the track, and after he came from under the coal-chute he had ample opportunity, if he had looked, or had exercised ordinary care, to have become aware of the danger in crossing the track, conceding he had no such opportunity while under the coal-chute.

If he was blinded by the headlight this fact makes his negligence the more culpable. He well knew the entire situation. The charge of the Court only exonerates the defendant from liability in the event the deceased had full knowledge of the want of adaptability of the machinery used, when, as a matter of law, a recovery cannot be had when the servant knew, or by

the exercise of ordinary care could have known, of the the defective machinery.

The measure of the company's duty to a person in the relation of the deceased to it is so important that we discuss it separately in our next point.

VI.

The obligation upon an employee of a railroad company to take care and exercise diligence in avoiding accidents is greater than that imposed upon a passenger or stranger.

The petition alleges that Louis D. Gentry was an engineer in the employ of the defendant railway company, and the proof shows that he had occupied that position for many years (Tr., pp. 19, 21); "twelve years" (p. 43); running the same train between Toyah and Big Springs, and having regular and fixed habits of leaving and returning to his engine.

He was "an old railroader, and had abundant reason to know" the custom of using "a road engine in place of a switch engine when the latter is disabled" (Tr., p. 21). One of plaintiff's witnesses testified (Tr., p. 34) as to the custom of using such an apparatus temporarily: "I think L. D. Gentry knew of this custom, and the opportunity he had for knowing it was that he had been a locomotive engineer for several years." Another of plaintiff's witnesses said (Tr., p. 36): "L. G. Gentry had abundant opportunity of knowing

that custom and rule, and it has always been the custom of the railway company to do this, and it was used by them day and night."

Under these circumstances we claim that the duty of Gentry to care for his personal safety and to exercise diligence in avoiding personal injury was greater than that ordinarily imposed upon a stranger to the locality and to the customs of the defendant railway company; and conversely that by reason of the employment of deceased and of his knowledge of the customs of the railway company and of his opportunities for knowing such customs, the railway company was relieved from exercising the same degree of care as is required of it in regard to passengers or other strangers to its management.

This Honorable Court has so held. In Aerkfetz vs. Humphreys, 145 U. S., 418, Mr. Justice BREWER, pronouncing the opinion of the Court, said:

"Plaintiff was a repairer of tracks. He had been employed there about eighteen months, and was familiar with the manner in which the work was done. The yard was about a quarter of a mile in length. The tracks were in a direct line east and west, with nothing to obstruct the view in either direction. At the time of the accident plaintiff was working near the west end of the yard, when *a switch engine pushing two cars* moved slowly along the track upon which he was at work, the speed of the engine being about that of a man walking. Plaintiff stood with his back to the approaching cars, and so remained at work without looking backward or watching for the moving engine, until he was struck and run over by the first car.

"Upon these facts we observe that *the plaintiff was an employé, and, therefore, the measure of duty to him was not such as to a passenger or a stranger.* As an employee of long experience in that yard, he was familiar with the moving of cars forward and backward by the switch engine. The cars were moved at a slow rate of speed, not greater than that which was customary and

that which was necessary in the making up of trains. For a quarter of a mile east of him there was no obstruction, and by ordinary attention he could have observed the approaching cars. He knew that the switch-engine was busy moving cars and making up trains, and that at any minute cars were likely to be moved along the track upon which he was working. With that knowledge he places himself with his face away from the direction from which the cars were to be expected, and continues his work without ever turning to look. Abundance of time elapsed between the moment the cars entered upon the track upon which he was working and the moment they struck him. There could have been no thought or expectation on the part of the engineer, or of any other employee, that he, thus at work in a place of danger, would pay no attention to his own safety. Under such circumstances what negligence can be attributed to the parties in control of the train or the management of the yard? They could not have moved the cars at any slower rate of speed. *They were not bound to assume that any employee, familiar with the manner of doing business, would be wholly indifferent to the going and coming of cars.* There were no strangers whose presence was to be guarded against. The ringing of bells and the sounding of whistles on trains going and coming, and the switch engines moving forward and backward would have simply tended to confusion. *The person in direct charge had a right to act on the belief that the various employees in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach.* * * * We see in the facts as disclosed no negligence on the part of the defendant, and if by any means negligence could be imputed to them, surely the plaintiff by his negligence and inattention contributed directly to the injury."

The judgment of the Circuit of Appeals should be reversed and the case remanded to the Circuit Court.

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APPENDIX.

From Sayle's Texas Civil Statutes.

TITLE 52. INJURIES RESULTING IN DEATH, ACTIONS FOR.

ART. 2899. ACTION FOR INJURIES RESULTING IN DEATH, BROUGHT WHEN. An action for actual damages on account of injuries causing the death of any person may be brought in the following cases:

1. When the death of any person is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, steamboat, stage coach or other vehicle for the conveyance of goods or passengers, or by the unfitness, negligence, or carelessness of their servants or agents.

2, When the death of any person is caused by the wrongful act, negligence, unskillfulness, or default of another (Amendment, March 25, July 4, 1887; 20 Leg., p. 44).

ART. 2900. CHARACTER OF WRONGFUL ACT. The wrongful act, negligence, carelessness, unskillfulness or default mentioned in the preceding article must be of such a character as would, if death had not ensued, have entitled the party injured to maintain an action for such injury (Act Feb. 2, 1860; 8 Leg., p. 32; P. D., 15).

ART. 2901. EXEMPLARY DAMAGES. When the death is caused by the willful act or omission, or gross negligence of the defendant, exemplary as well as actual damages may be recovered (Const., Art. 16, par. 26).

ART. 2902. WITHOUT REGARD TO CRIMINAL PROCEEDINGS. The action may be commenced and prosecuted, although the death shall have been caused under such circumstances as amounts in law to a felony, and without regard to any criminal proceeding that may or may not be had in relation to the homicide (Act Feb. 2, 1860; 8 Leg., p. 32; P. D., 15).

ART. 2903. FOR WHOSE BENEFIT ACTION BROUGHT. The action shall be for the sole and exclusive benefit of the surviving husband, wife, children and parents of the person whose death shall have been so caused, and the amount recovered therein shall not be liable for the

debts of the deceased (Act February 2, 1860; 8 Leg., p. 32; P. D., 16).

ART. 2904. WHO MAY BRING THE ACTION. The action may be brought by all of the parties entitled thereto, or by any one or more of them for the benefit of all (Act February 2, 1860; 8 Leg., p. 32; P. D., 16).

ART. 2905. EXECUTOR, ETC., MAY, WHEN. If the parties entitled to the benefit of the action shall fail to commence the same within three calendar months after the death of the deceased, it shall be the duty of the executor or administrator of the deceased to commence and prosecute the action, unless requested by all of the parties entitled thereto not to prosecute the same (Act February 2, 1860; 8 Leg., p 32; P. D., 17).

ART. 2906. SUIT DOES NOT ABATE BY DEATH. The action shall not abate by the death of either party to the record if any person entitled to the benefit of the action survives. If the plaintiff die pending the suit, when there is only one plaintiff, some one or more of the parties entitled to the money recovered may, by order of the Court, be made plaintiff and the suit be prosecuted to judgment in the name of such plaintiff for the benefit of the persons entitled (Act Feb. 2, 1860, 8 Leg., p. 32; P. D. 18).

ART. 2907. SUIT ABATES, WHEN. If the sole plaintiff die pending the suit, and he is the only party entitled to the money recovered, the suit shall abate.

ART. 2908. EXECUTOR, ETC., MADE PARTY, WHEN. If the defendant die pending the suit, his executor or administrator may be made a party, and the suit be prosecuted to judgment as though such defendant had continued alive. The judgment in such case, if rendered in favor of the plaintiff, shall be to be paid in due course of administration (Act Feb. 2, 1860, 8 Leg., p. 32; P. D. 18).

ART. 2909. DAMAGES APPORTIONED BY JURY. The jury may give such damages as they may think proportioned to the injury resulting from such death; and the amount so recovered shall be divided among the persons entitled to the benefit of the action, or such of them as shall then be alive, in such shares as the jury shall find by their verdict. (Act Feb. 2, 1860, 8 Leg., p. 32; P. D. 16.)